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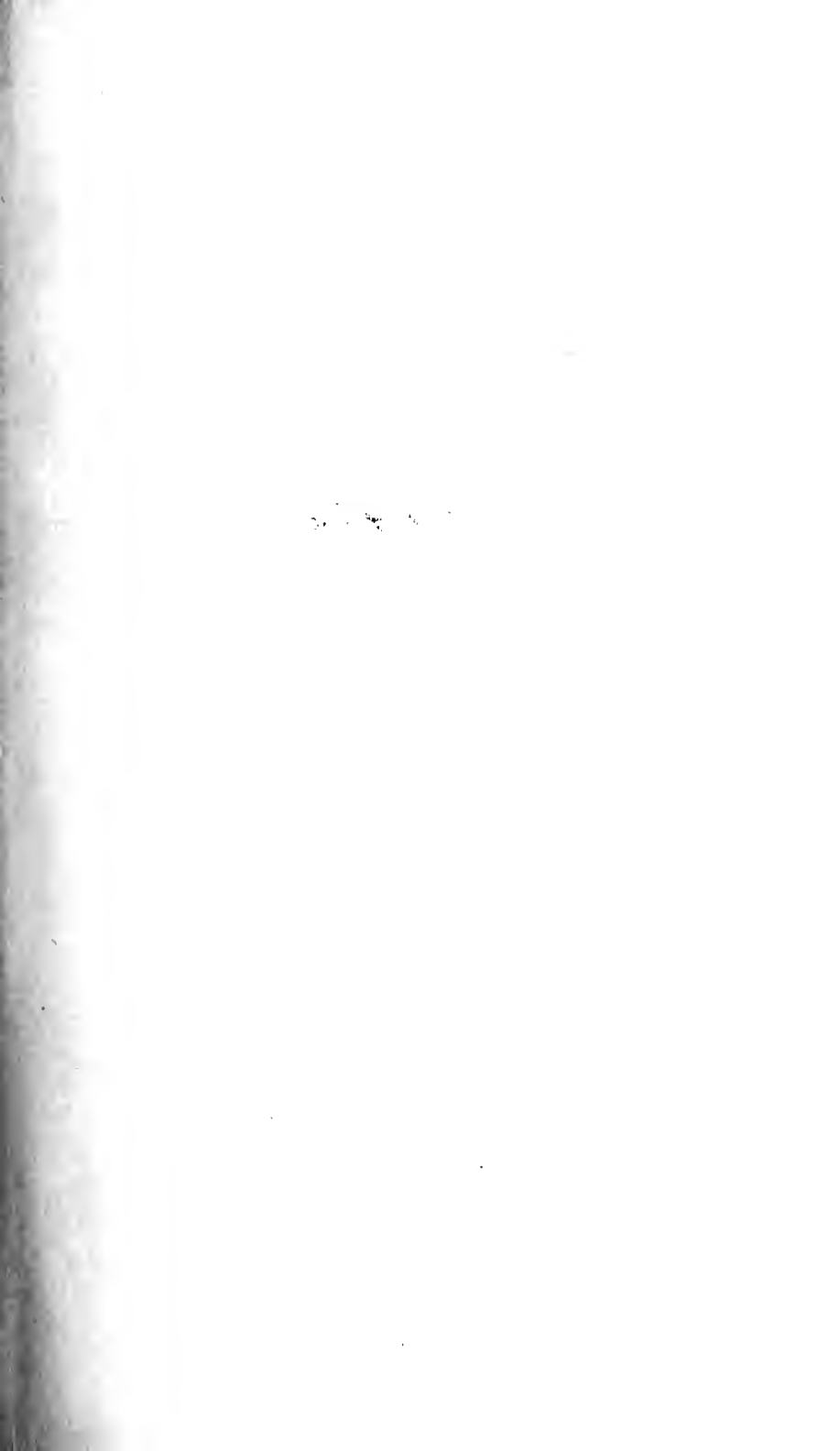
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No. 12222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S OPENING BRIEF.

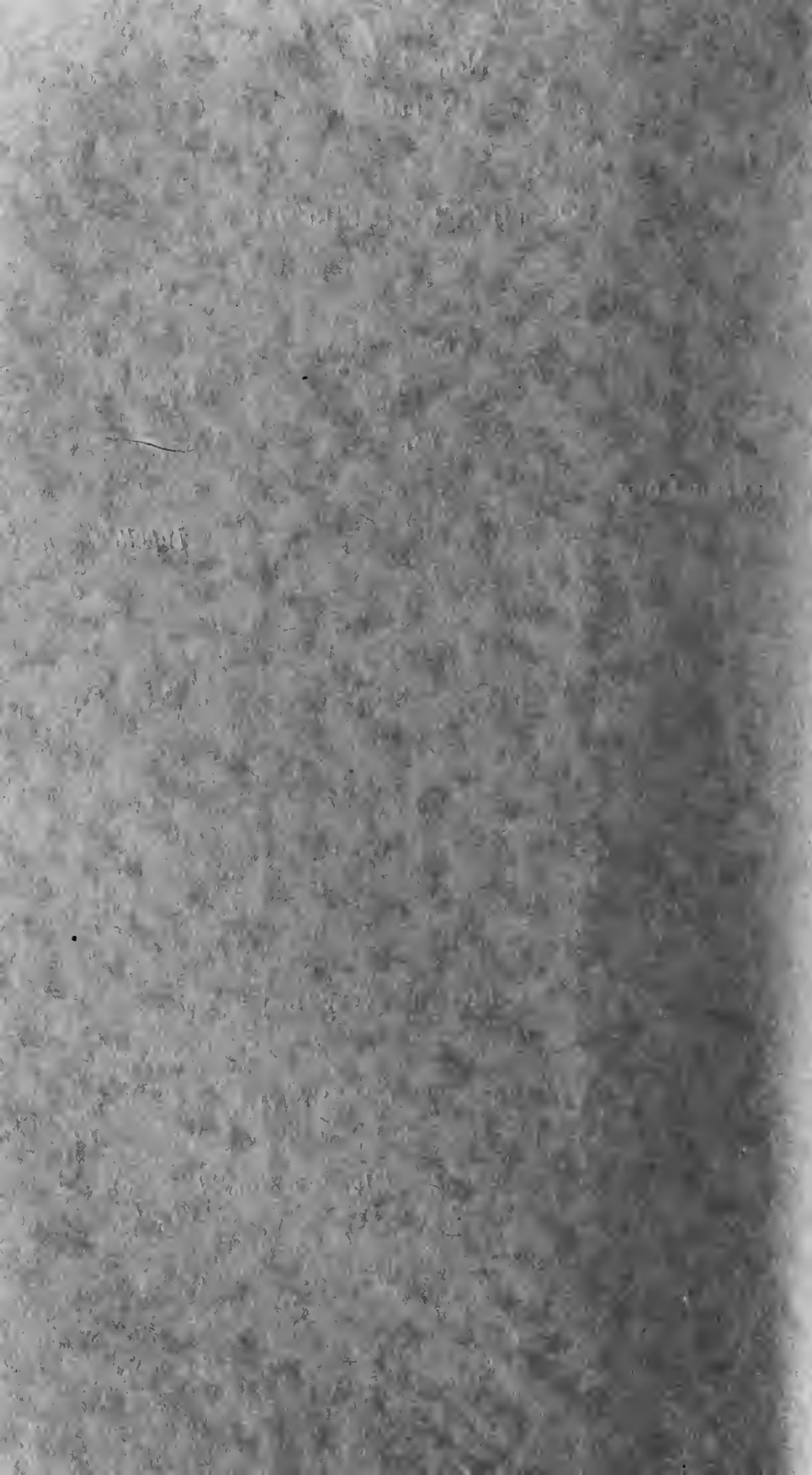
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No. 12222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S OPENING BRIEF.

INTRODUCTORY STATEMENT.

This is an appeal by Loew's Incorporated, a producer of motion pictures and the defendant below, from a declaratory judgment entered after a special jury verdict.¹

The controversy in connection with which the rights and obligations of the parties were declared may be briefly stated as follows:

¹The parties will be referred to in this brief by their designations in the trial court.

Plaintiff was employed by defendant under a written contract as a writer of screenplays or scenarios. The contract provided, among other things, that plaintiff would not do anything that would tend to bring him into public scorn or contempt or shock or offend the community or that would prejudice his employer or the motion picture industry generally.

Between October 20th and October 30, 1947, the Committee On Un-American Activities of the House of Representatives conducted a public hearing as part of its inquiry regarding alleged Communist infiltration of the motion picture industry. Plaintiff was called as a witness and, in response to questioning by the Committee, refused to disclose whether he was or had been a member of the Communist Party. For such refusal he was cited and indicted for contempt of the Congress of the United States. The Committee hearing and the conduct of plaintiff as a part thereof received intensive nation-wide publicity by radio, editorial comment, news reels and all of the other media of news distribution. It was and is the contention of defendant that the conduct of plaintiff at and in connection with said hearing created throughout the country a widespread belief that plaintiff was a Communist and that he held in contempt the Congress of the United States and the fundamental institutions of this country. It was and is the contention of defendant that the conduct of plaintiff created throughout the country a widespread belief that the defendant and the motion picture industry

generally employed and harbored Communists and had a sympathetic and indulgent attitude towards Communism. It was and is the contention of defendant that such conduct of plaintiff brought or tended to bring plaintiff into public scorn and contempt, tended to shock and offend the community and prejudiced the interests of the defendant, his employer, and the motion picture industry generally. It was and is the contention of defendant that plaintiff by such conduct violated his contractual obligations and therefore was not entitled to enforce the employment contract against defendant.

The verdict of the jury and the consequent judgment of the trial court was to the effect that plaintiff had not violated those provisions of the employment contract to which particular attention has been directed and that plaintiff was entitled to enforce the contract against defendant. It is the contention of defendant that a fair trial and a proper determination of the factual issues was not had, because of erroneous rulings of the trial court on the admission and exclusion of evidence, because of errors in the trial court's charge to the jury, and because of the refusal of the District Judge to disqualify himself on the ground of personal bias and prejudice against the defendant.

STATEMENT OF JURISDICTION.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 [formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)] providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3000 . . . and is between: (1) Citizens of different States; . . ."; and U. S. Code, Title 28, Sec. 1441. [formerly the Act of Mar. 3, 1875, *supra*, Sec. 2; 28 U. S. C. A., Sec. 71] providing that "Any civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed . . . to the district court"

2. The existence of the jurisdiction is shown by the following allegations of the complaint: (a) "Plaintiff is a resident of the County of Los Angeles, State of California. . . . Defendant, Loew's Incorporated, is a corporation organized under the laws of Delaware; it maintains a principal office and transacts business in the County of Los Angeles, State of California. . . ." [R. 2]; (b) "On or about December 5, 1945, plaintiff and defendants² entered into a contract, a copy of which is attached hereto as Exhibit 'A' . . ." [R. 3] which contract as amended provided for compensation to plaintiff at the rate of \$1350 per week [R. 23, 33]; (c) On or about December 2, 1947, defendant suspended plaintiff's

²In addition to Loew's Incorporated several fictitious defendants were named. [R. 2.] None was ever served and the cause was dismissed as to them at the commencement of the trial.

employment and compensation under said contract [R. 3-5]; (d) "A controversy affecting the rights of the parties under the said agreement now exists in this . . . Defendants contend and assert that on December 2nd, 1947 they had, and that they now have, the right . . . to suspend and to continue to suspend payment of compensation to the plaintiff . . ." which right the plaintiff denies [R. 3-5]; (e) "Wherefore plaintiff prays for a judgment declaring that . . . the plaintiff is entitled to compensation at the rate provided in the said contract of employment from December 5, 1945 to the date of judgment to be rendered in this action, giving the defendant credit for compensation heretofore paid. . . ." ³
[R. 6.]

3. The statutory provisions believed to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 [formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A. Sec. 225(a)] providing that the "court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."; and U. S. Code, Section 1294 [formerly the Act of Mar. 3, 1891, *supra*; 28 U. S. C. A. Sec. 225(d)] providing that "Appeals from reviewable decisions of the district . . . courts shall be taken . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

³The complaint was filed on January 7, 1948 [R. 38] so that there was already in controversy at that time compensation in an amount exceeding \$3000, *i. e.* 5 weeks at \$1350 per week.

STATEMENT OF THE CASE.

A. The Pleadings and Issues.

1. In his complaint the plaintiff alleged that he was an experienced writer in the motion picture industry and that the defendant was engaged in the business of producing motion pictures; that on December 5, 1945, he was employed by the defendant, for a period of two years (with options to extend the term) as a writer under a written contract, a copy of which was attached; and that until December 2, 1947, the contract was performed by both parties, after which performance by plaintiff was prevented. [R. 2-3.] It appears from the contract attached to the complaint that among the obligations undertaken by plaintiff was the following [R. 12]:

“5. The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.”

On December 2, 1947, the complaint continues, defendant served on plaintiff the following notice [R. 3-4]:

“Dear Mr. Cole:

“At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.

“By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself

into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

“Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

“This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,

By LOUIS K. SIDNEY,

Asst. Treasurer.”

The controversy between the parties is then alleged to consist of defendant's contention that it had the right to suspend and continue to suspend plaintiff's employment and compensation; and plaintiff's contention that every statement of fact in the notice was false and untrue and that notwithstanding the truth or falsity thereof defendant did not and does not have the right to suspend or continue to suspend plaintiff's employment or compensation for any reason or on any ground whatever. [R. 4-5.]

Plaintiff's readiness, willingness and ability to perform were alleged in the conventional form; as well as the irreparable injury to plaintiff assertedly flowing from the suspension.^{3a} [R. 5-6.]

The relief prayed was a judgment declaring that defendant does not have and never had any right to suspend plaintiff's employment or compensation and that plaintiff is entitled to compensation at the contract rate; and enjoining defendant from continuing the notice of suspension in effect. [R. 6.]

2. The answer admitted execution of the contract and commencement of performance under it but denied that plaintiff had well or truly performed, that he was ready, willing or able to perform, or that he had been prevented by defendant from performing. The existence of the controversy was admitted but the correctness of plaintiff's contentions was denied, as was also the fact of any irreparable injury to him. [R. 41-2.] The prayer was for a declaration of the rights and duties of the parties in accordance with defendant's claims. [R. 42.]

3. After a series of pre-trial conferences held pursuant to F. R. C. P., Rule 16, a formal pre-trial order was entered. [R. 77-85.] That order recited certain stipulations of fact entered into by counsel and then provided [R. 84-5]:

^{3a}Attention is directed to the fact that there is no suggestion that any element of waiver or condonation of a breach of contract by plaintiff is involved.

“The following issues of fact remain for determination:

“(A) What were plaintiff’s acts, conduct and activities, severally and/or in association or concert with others, in respect of the matters referred to in the notice [of suspension] marked ‘Plaintiff’s Exhibit 3’?

“(B) Did plaintiff by his conduct and activities during and in connection with his said appearance as a witness before the Committee on Un-American Activities shock and offend the community, bring himself into public scorn and contempt, substantially lessen his value as an employee to defendant Loew’s Incorporated, prejudice the interests of said employer and/or the motion picture industry generally, and render himself unable to render the kind and quality of services required and contemplated by the contract of employment and/or the employment relationship created thereby?

“(C) Did plaintiff by his said conduct and activities injure or prejudice the interests of defendant Loew’s Incorporated, or bring about the likelihood or danger of any such injury or prejudice?

“(D) Did the act of defendant Loew’s Incorporated in delivering and putting into effect the notice marked ‘Plaintiff’s Exhibit 3’ cause irreparable injury to plaintiff?”

It will be noted that no issue in respect of waiver or condonation of plaintiff’s alleged breach of contract was specified in this order settling the issues.⁴

⁴Nevertheless, and over defendant’s objection, the issue of waiver was submitted to the jury. [See, Point I, C, 1, *infra*, pp. 78-9.]

B. The Facts.

1. The Congressional Investigation and Plaintiff's Conduct in Connection Therewith.

In 1947 and for some time prior thereto considerable public attention had been directed to claims that a number of Communists had infiltrated into responsible, creative positions in the motion picture industry and were thus enabled to use and were in fact using their influence to disseminate pro-Communist and un-American propaganda through the medium of the screen. Accordingly the Committee on Un-American Activities of the House of Representatives,⁵ pursuant to its statutory authorization "to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principles of the form of government as guaranteed by our Constitution. . . ." [*Legislative Reorganization Act of 1946*, Act of Aug. 2, 1946, Chap. 753, Title I, Part 2, Sec. 121(q), 60 Stat. 828], undertook an investigation into alleged Communistic infiltration of the motion picture industry. [R. 351-3, 321, 363, 571-2, 621, 79-84.]

During the month of May, 1947, a sub-committee of the Congressional Committee pursued the investigation by means of a closed hearing in Los Angeles. In connection with this hearing a number of persons identified with the motion picture industry were interviewed and a considerable number were examined. Nation-wide publicity was given to this investigation, which was being had behind

⁵Hereinafter for convenience referred to as the "Congressional Committee" or the "Committee."

closed doors, and to the participation therein of various motion picture personalities. [R. 351-2, 321, 638-43, 755.] In June, 1947, Mr. Smith and Mr. Leckie, two investigators employed by the Committee, appeared in Los Angeles and interviewed a number of motion picture executives and others connected with the industry for the purpose of securing information and for the purpose of procuring testimony at an open hearing by the Committee to be presently held. Plaintiff had knowledge of the presence and of the activities of these investigators and their presence and activities were the subject of comment in the press and other media of public information. [R. 287-91, 299-300, 321-34, 658, 758-9.]

Commencing on October 20 and continuing through October 30, 1947, an open hearing was held by the Committee in Washington, D. C. A large number of motion picture executives, actors, writers and directors had been served with subpoenas to attend and testify and among these was the plaintiff Lester Cole and some eighteen others who came to be known and referred to as the "unfriendly witnesses." [R. 321, 505-6, 417-19, 501, 620-1 625, 644-5, 411-12.]

Before the open hearing was discontinued eleven of the "unfriendly witnesses" were called to testify. Plaintiff was the last of the unfriendly witnesses to be called to the stand. [R. 426, 533, 535, 485, 646.] Following is his complete testimony⁶ [R. 478-84]:

⁶At the trial of the instant case there was produced for the jury's hearing and sight a sound motion picture of plaintiff on the stand before the Committee; and also a phonographic recording of his testimony. [R. 477-8; 698-702.] An offer by defendant to produce and exhibit a similar motion picture of the appearances and testimony of nine others of the unfriendly witnesses was denied by the trial court. [See, Point II, A, *infra*, pp. 110-12.]

“Mr. Stripling: Mr. Cole, will you please state your full name and present address?”

Mr. Cole: Lester Cole, 15 Courtney Avenue, Hollywood, Calif.

Mr. Stripling: When and where were you born, Mr. Cole?

Mr. Cole: I was born June 19, 1904, in New York City.

Mr. Stripling: What is your occupation?

Mr. Cole: I am a writer.

Mr. Stripling: How long have you been a writer?

Mr. Cole: For approximately 15, 16 years.

Mr. Stripling: How long have you been in Hollywood?

Mr. Cole: Since—I first came to Hollywood in 1926; I left and went back to New York in 1929; returned in 1932, and have been there ever since.

Mr. Stripling: Are you a member of the Screen Writers Guild?

Mr. Cole: Mr. Chairman, I would like at this time to make a statement.”

[Statement was then read by Committee.]

“Mr. McDowell: I think it is insulting, myself.

The Chairman: This statement is clearly another case of vilification and not pertinent at all to the inquiry. Therefore, you will not read the statement.

Mr. Cole: Well, Mr. Chairman—

The Chairman: Mr. Stripling, ask the first question.

Mr. Cole: Mr. Chairman, may I just ask if I do not read my statement—

The Chairman: You will not ask anything.

Mr. Cole: Is the New York Times editorial pertinent—the editorial in the Herald Tribune pertinent?

The Chairman: Go ahead and ask the question.

Mr. Stripling: Mr. Cole, are you a member of the Screen Writers Guild?

Mr. Cole: I would like to answer that question and would be very happy to. I believe the reason the question is asked is to help enlighten—

The Chairman: No, no, no, no, no.

Mr. Cole: I hear you, Mr. Chairman, I hear you, I am sorry, but—

The Chairman: You will hear some more.

Mr. Cole: I am trying to make these statements pertinent.

Mr. Chairman: Answer the question, 'Yes' or 'no.'

Mr. Cole: I am sorry sir, but I have to answer the question in my own way.

The Chairman: It is a very simple question.

Mr. Cole: What I have to say is a very simple answer.

The Chairman: Yes; but answer it 'yes' or 'no.'

Mr. Cole: It isn't necessarily that simple.

The Chairman: If you answer it 'yes' or 'no,' then you can make some explanation.

Mr. Cole: Well, Mr. Chairman, I really must answer it in my own way.

The Chairman: You decline to answer the question?

Mr. Cole: Not at all, not at all.

The Chairman: Did you ask the witness if he was here under subpoena?

Mr. Cole: What is it, Mr. Chairman? I beg your pardon?

Mr. Stripling: Mr. Cole, you are here under subpoena served upon you on September 19, are you not?

Mr. Cole: Yes; I am.

Mr. Stripling: And the question before you is: Are you a member of the Screen Writers Guild?

Mr. Cole: I understand the question, and I think I know how I can answer it to the satisfaction of the committee. I wish I would be permitted to do so.

The Chairman: Can't you answer the question?

Mr. Cole: You wouldn't permit me to read my statement and the question is answered in my statement.

The Chairman: Are you able to answer the question 'yes' or 'no,' or are you unable to answer it 'yes' or 'no'?

Mr. Cole: I am not able to answer 'yes' or 'no.' I am able, and I would like to answer it in my own way. Haven't I the right accorded to me, as it was to Mr. McGuinness and other people who came here?

The Chairman: First, we want you to answer 'yes' or 'no,' then you can make some explanation of your answer.

Mr. Cole: I understand what you want, sir. I wish you would understand that I feel I must make an answer in my own way, because what I have to say—

The Chairman: Then you decline to answer the question?

Mr. Cole: No; I do not decline to answer the question. On the contrary, I would like very much to answer it; just give me a chance.

The Chairman: Supposing we gave you a chance to make an explanation, how long would it take you to make that explanation?

Mr. Cole: Oh, I would say anywhere from a minute to 20, I don't know.

The Chairman: Twenty?

Mr. Cole: Sure. I don't know.

The Chairman: And would it all have to do with the question?

Mr. Cole: It certainly would.

The Chairman: Then would you finally answer it 'yes' or 'no.'

Mr. Cole: Well, I really don't think that is the question before us now, is it?

The Chairman: Then go to the next question.

Mr. Stripling: Mr. Cole, are you now or have you ever been a member of the Communist Party?

Mr. Cole: I would like to answer that question as well; I would be very happy to. I believe the reason the question is being asked is that because at the present time there is an election in the Screen Writers Guild in Hollywood that for 15 years Mr. McGuinness and other—

The Chairman: I didn't even know there was an election out there. Go ahead and answer the question. Are you a member of the Communist Party?

Mr. Cole: If you don't know there is an election there you didn't hear Mr. Lavery's testimony yesterday.

The Chairman: There were some parts I didn't hear.

Mr. Cole: I am sorry, but I would like to put it into the record that there is an election there.

The Chairman: All right, there is an election there. Now, answer the question. Are you a member of the Communist Party?

Mr. Cole: Can I answer that in my own way, please? May I, please? Can I have that right? Mr. McGuinness was allowed to answer in his own way.

The Chairman: You are an American, aren't you?

Mr. Cole: Yes, I certainly am, and it states so in my statement.

The Chairman: Then you ought to be very proud to answer the question.

Mr. Cole: I am very proud to answer the question, and I will at times when I feel it is proper.

The Chairman: It would be very simple to answer.

Mr. Cole: It is very simple to answer the question—

The Chairman: You bet.

Mr. Cole (continuing): And at times when I feel it is proper I will, but I wish to stand on my rights of association—

The Chairman: We will determine whether it is proper.

Mr. Cole: No, sir. I feel I must determine it as well.

The Chairman: We will determine whether it is proper. You are excused."

The statement referred to in this transcript was introduced in evidence below. It reads as follows [R. 473-5]:

"STATEMENT BY LESTER COLE

"Submitted to House Un-American Activities Committee October 30, 1947.

"I want to say at the outset that I am a loyal American, who upholds the Constitution of my country, who does not advocate force and violence, and who is not an agent of a foreign power.

"This Committee has announced many times its interest in facts pertinent to this inquiry. I believe many such facts are embodied in this statement.

"I have been a working screen-writer in the Motion Picture Industry since 1932. To date, I have written thirty-six screen plays, the titles of which and companies which produced them are attached.

"I was working in Hollywood in 1933 when screen writers, faced with an arbitrary fifty per cent cut in salaries, formed the Screen Writers' Guild for the purpose of collective bargaining.

“From the very start there were attempts to create strife within the industry by groups who used the same technique employed by this committee.

“After years of failure by James Kevin McGuinness, Rupert Hughes and other of your friendly witnesses to disrupt the Screen Writers’ Guild, and with it the industry, a desperate appeal was made to Martin Dies, former Chairman of this Committee. Or maybe Martin Dies made the appeal; at any rate the investigations began.

“When the Dies investigation proved unsuccessful because of the united resistance of the men and women of the industry, a new tactic was employed. Willie Bioff and George S. Browne were called into the fray.

“These two men, Browne and Bioff who ran the IATSE, the union which was represented here the other day by Mr. Roy Brewer, took on the job of creating chaos in the industry. They bought full page advertisements in the Hollywood trade papers, the ‘Reporter’ and the ‘Daily Variety,’ announcing their intentions of taking over all independent Hollywood Guilds and Unions, but only, of course, for one purpose; the eradication of Communism. You will recall that Al Capone, just before going to jail, called upon the American people to ‘eradicate’ all subversive un-American influences in American life, including Communism. By a strange coincidence, the warning of Browne and Bioff also was issued but a short time before they too went to jail for the extortion of huge sums of money; a shakedown of the motion picture industry.

“For fifteen years these men have engaged in slander, malicious gossip, near libel; in fact, in every

method known to man but one—traditional American democratic procedure.

“As in years gone by they accommodated Martin Dies, and later extortionists Browne and Bioff, today McGuinness, Incorporated, is playing footsies with the House Committee on Un-American Activities. They think the Committee is stooging for the Motion Picture Alliance; the reverse is true.

“From what I have seen and heard at this hearing, the House Committee on Un-American Activities is out to accomplish one thing, and one thing only, as far as the American Motion Picture Industry is concerned; they are going either to rule it, or ruin it.

“This Committee is determined to sow fear of blacklists; to intimidate management, to destroy democratic guilds and unions by interference in their internal affairs, and through their destruction bring chaos and strife to an industry which seeks only democratic methods with which to solve its own problems. This Committee is waging a cold war on democracy.

“I know the people in the motion picture industry will not let them get away with it.”

About two hundred copies of that statement had been prepared by plaintiff prior to his appearance before the Congressional Committee. After his withdrawal from the stand he distributed over a hundred copies to various press representatives covering the hearing. [R. 859.]

As a consequence of his refusal to answer the question directed to Communist Party membership plaintiff was cited and subsequently indicted for contempt of Congress. At the time of the trial below the indictment against

plaintiff was undetermined, for reasons which are not deducible from the record here.⁷ [R. 853-4, 861-2.]

At no time was the plaintiff's intention not to answer any question relating to Communist membership made known to the defendant. Defendant's first knowledge of plaintiff's intention to defy the Congressional Committee in this regard came through learning of plaintiff's actual conduct on the witness stand. [R. 309-10, 351, 420-1, 499, 743-4.]

The preparations for this hearing and the conduct and testimony of the persons appearing, including plaintiff and the other unfriendly witnesses, were given extensive and intensive nation-wide—in fact, world-wide—publicity. Accounts of the matter were prominently featured in the daily press throughout the country and over the radio; broadcasts of the actual testimony were made over the radio; news-reels depicting the scene and reproducing the testimony were disseminated in the nation's theatres; and the whole matter was the subject of wide-spread editorial comment. [R. 351-3, 471, 651, 656-64, 778, 859. See Deft. Exs. G and H, R. 783-4.] In short, the evidence shows that the hearings were so thoroughly communicated to the public generally as to make them the leading current topic of news and discussion.

⁷The record indicates that at least two other of the unfriendly witnesses were cited for contempt. [R. 648-9.] Any effort to prove the fate of these citations, or what occurred with reference to the remainder of the ten men who testified and who were part of the group of which plaintiff was a member, would have been fruitless in view of the trial court's frequently announced determination to exclude any testimony going beyond plaintiff's individual conduct. [See, Point II, A, *infra*, pp. 110-12.]

2. Plaintiff's Collaboration With and the Conduct of Other Unfriendly Witnesses.

While evidence of the conduct and testimony before the Committee of the other unfriendly witnesses was excluded below, the close relationship of the group was such that it could not be concealed even by the most determined effort; and some incidental evidence in that regard, which came in *apropos* of other matters, justifies the following statements. The nineteen unfriendly witnesses were jointly represented by a battery of six lawyers (four of whom appeared for the plaintiff in the court below). [R. 415-18.] Prior to the commencement of the hearing they joined in a public advertisement of an "open letter" to the motion picture industry relating to the forthcoming hearing. [R. 638-43.] They conferred together prior to and during the hearings, including a discussion of the manner in which they would conduct themselves before the Committee, and they joined in a motion to quash the service of subpoenas upon them. [R. 624-33, 648, 425-7.] And in a conversation after the hearing, with Mr. L. B. Mayer (defendant's studio head) the plaintiff stated that the conduct of all of the ten had been the subject of an agreement among them. [R. 362-3.]

On their behalf as a group, their attorneys requested and held a meeting with Eric Johnston, President of the Motion Picture Association of America and the Association of Motion Picture Producers, and Messrs. McNutt and Benjamin, counsel appearing for the Association. This meeting took place the night before the hearings commenced. It was concerned with a discussion of the motion to quash which had been or was being filed by the unfriendly witnesses, and of the position which the Association planned to take at the hearings. In these discussions, plaintiff's attorneys were told that the motion

picture industry had publicly welcomed the investigation, asking only for a fair hearing, and so could not join in any attack on the validity or legality of the investigation. At the end of the meeting Mr. Johnston was asked if there was any truth in rumors that he had agreed with the Committee on a blacklist, to which he replied that he had not and would not stand for any such thing.⁸ [R. 405-28, 737-49, 768-72.]

Eleven of the nineteen unfriendly witnesses were called to the stand at the Committee hearing in Washington. Each of them had prepared and requested permission to read a statement, but only two were allowed to do so. [R. 426, 530, 533, 646.] Although defendant attempted to introduce complete evidence of their testimony and conduct, such evidence was excluded by the rulings of the trial judge. [See, Point II, A, *infra*, pp. 110-12.] It is, however, reasonably inferable from the record that each of them was asked if he was or ever had been a member of the Communist Party and that ten of them refused to answer that question. [R. 362, 379-86, 284-7.]

3. The Action of the Motion Picture Industry With Respect to Plaintiff and the Other Unfriendly Witnesses.

As a consequence of the conduct of the unfriendly witnesses before the Congressional Committee and the resulting nation-wide furore, representatives of the defendant and of a large majority of the motion picture producing companies met in New York on November 24 and 25, 1947. After discussions extending over a period of two days, and with the advice of former Justice James F.

⁸Mr. Johnston and Mr. Benjamin testified that the answer to this query was only to the effect that Mr. Johnston had made no agreement or "deal" with the Committee. [R. 742, 771.] In the text above, however, we have adopted the version given by plaintiff's attorney and witness, Robert W. Kenny.

Byrnes, a declaration of policy was adopted.⁹ [R. 282-7, 336-9, 354-7, 375-6, 389-95, 784-92, 812-17.]

The gist of the declaration of policy was that of the “ten Hollywood men . . . cited for contempt by the House of Representatives . . .” those who were then employed would be discharged or suspended, and none of the ten would be employed or re-employed until they had been acquitted or purged of contempt and had declared under oath that they were not Communists. [R. 285-6.] Pursuant to this policy, in which the defendant concurred, plaintiff was suspended. [R. 339-40.]

The discussion which led up to the adoption of this policy was gone into below at some length, but subject to a limiting ruling that the testimony in respect thereof was admitted only to show the nature of the discussion and was not to be taken as evidence of the facts recited.¹⁰ [R. 385-6, 792-3.] For the purpose of this statement the discussion may be summarized as one in which it was the consensus that the unfriendly witnesses had led the public, or a substantial part thereof, to believe that the unfriendly witnesses were Communists and that the motion picture industry was harboring Communists and fostering Communism; that the unfriendly witnesses, as a consequence

⁹The fact of the meeting, portions of its proceedings and the accomplishment of the meeting, *i. e.*, the declaration of policy, were introduced in evidence by plaintiff. Through the door so opened by plaintiff defendant sought to introduce evidence showing that the reasons for the adoption of the policy rested in the testimony and conduct before the Committee of the unfriendly witnesses and the public reaction to that testimony and conduct. The trial court refused the proffered evidence and the door which had been thrown wide open by plaintiff was tightly closed to defendant by the rulings of the trial court.

¹⁰The actual facts could not be proved because of the trial court's exclusion of any evidence of the testimony and conduct of the ten men and the effect on the public of that testimony and conduct. [See Point II, A, *infra*, pp. 110-12.]

of this belief which they had created, had shocked and offended the community and had brought themselves and the industry into public scorn and contempt; and that the retention of the unfriendly witnesses as employees in the industry would create new and aggravate the already created public ill-will against the industry. [R. 786-92, 380-95.]

4. Contractual and Business Relations of the Parties.

a. THE CONTRACT.

The plaintiff has been engaged as a motion picture writer since about 1932. He was first employed in that capacity by the defendant in 1945. At that time his employment was on a free-lance or week-to-week basis. Late in 1945, after discussions looking toward that end, he was employed under a term contract which, as amended in 1947, is the contract in suit. [R. 430-3.] The significant provisions of that contract are those contained in paragraph 5, by virtue of which plaintiff was expressly obligated not to do any act or thing which would tend to bring him into public hatred, contempt, scorn or ridicule or which would tend to shock, insult or offend the community or prejudice his employer or the motion picture industry generally. [R. 12. Quoted, *supra*, p. 6.]

Other provisions of the agreement which may assume some importance in the argument are paragraphs 11 and 12, relating to defendant's rights and remedies in the event of plaintiff's "failure, refusal or neglect . . . to perform his required services . . . or observe any of his obligations . . . to the full limit of his ability or as instructed. . . ." [R. 17-21.]

b. THE AMENDMENT.¹¹

At the time of plaintiff's original term employment he was informed that if, after a year, his services were satisfactory an adjustment of his compensation would be made. Accordingly, in the spring of 1947 and down to about the middle of August of that year, plaintiff and his agent had a series of conversations with various of defendant's executives looking to such an adjustment. In the course of these negotiations, according to plaintiff and his agent, plaintiff became fearful that the consummation of a satisfactory revision was being delayed or forestalled by defendant's concern over almost daily attacks upon plaintiff then assertedly appearing in the Hollywood Reporter, a motion picture trade publication. These attacks, said to identify plaintiff by name, charged him with Communist membership and activity. Pointed inquiry, therefore, was made of defendant's executives in this regard by plaintiff and his agent and assurances were given that defendant was not at all interested in plaintiff's politics or the charges assertedly made against him. [R. 256-8, 304-6, 318-20, 353-4, 376-7, 396-405, 434-40, 549-72.]

In point of fact, however, when plaintiff was confronted with a complete file of the Hollywood Reporter for the period during which these discussions took place, he admitted, after examination of the file, that there were no articles or stories, of the sort he and his agent had previously described, in which he was named. [R. 571-2.]

¹¹The evidence in this connection, consisting largely of conversations, was admitted over defendant's objection that the negotiations were merged in the written agreement. [R. 434-5, 431-2, 436-7.] It is now the basis upon which the claim of waiver or condonation mainly rests. At the time it was offered, however, there was no intimation of this purpose. [See Point I, C, 1, *infra*, pp. 78-9.] The first suggestion of condonation was vouchsafed at a late stage in the trial in reply to defendant's objection that some proposed testimony was not within the issues. [R. 694-5. See note 12, *infra*, p. 26.]

In any event, the result of these negotiations was the execution, on or about September 19, 1947, of the amendatory agreement. On that day plaintiff was told in a telephone call from E. J. Mannix, one of defendant's executives, that a United States Marshal was in the latter's office with a subpoena to serve. In response to Mannix' query if he wanted "to duck" or "get out" plaintiff replied, "Of course not," that he was in the barber shop and the marshal could effect service there. Mannix, however, suggested that plaintiff should go to the office of Floyd Hendrickson, head of defendant's contract department, instead. There plaintiff was served with a subpoena to appear at a hearing of the Congressional Committee in Washington, D. C., after which Mr. Hendrickson said, "Now that that is over, let's get down to our business." Plaintiff and Hendrickson then read over the final draft of the amendment, and after plaintiff's agent had been called and had read it, plaintiff signed. It was signed by the defendant a day or so later. [R. 446-8, 449.]

By the terms of the amendment, defendant exercised its first option to extend plaintiff's employment for a term of two years at a salary of \$1350 per week; agreed not to exercise its right to lay off plaintiff during the extended term, so that plaintiff would receive 52 weeks' compensation each year instead of a guaranteed minimum of 40 weeks; agreed to give plaintiff a vacation of six weeks with pay each year and, at plaintiff's election, an additional six weeks each year without pay. [R. 33-38.]

C. PLAINTIFF'S PERFORMANCE.

Plaintiff rendered his services as a writer from the execution of the term contract to December 3, 1947, on which day he received the notice of suspension previously quoted. [*Supra*, pp. 6-7.] During that time he wrote

or collaborated in the writing of the screenplays for "Romance of Rosy Ridge," "Fiesta," "High Wall" and "Mercer Girls," the latter of which was not produced. At the time of the suspension he was working on the screenplay for a proposed photoplay entitled "Zapata." [R. 304, 307-9, 313-14.] The three pictures which were produced continued in distribution following plaintiff's suspension. [R. 343-4.] Plaintiff's name appeared on the screen as the writer or one of the writers of the pictures although not as prominently or in type as large as that in which the names of the stars appeared. [R. 655, 867.]

When plaintiff left Los Angeles to attend the Committee hearing in Washington he volunteered to complete the story outline for "Zapata" while there; and some of his notes in that regard were delivered to Mr. Cummings, the producer of the picture, while plaintiff was still in Washington. On plaintiff's return from the hearings, in the early part of November, 1947, he continued to confer with Mr. Cummings, although a decision as to whether the production should be continued was then being awaited. No decision in that regard had been made at the time of the suspension. [R. 307-8, 449-50, 489-90, 540-48, 694.] Plaintiff's salary was paid regularly until he was suspended.¹² [R. 694-6.]

Plaintiff's services, apart from his conduct in connection with the Congressional investigation into Communism, were admittedly satisfactory. In fact, it is clear from the testimony that, but for the situation which gave rise to the suspension, defendant would have been glad, indeed anxious, to keep him in its employ. [R. 257-8, 303, 317, 346.]

¹²Questioning along this line was objected to by defendant as immaterial and not within the issues. It was at this point—redirect examination of plaintiff and near the close of his case—that the first suggestion of a claim of condonation was made. [R. 694-5.]

d. NON-CONTRACT DISCUSSIONS BETWEEN THE PARTIES.

Two conversations between plaintiff and Mr. Louis B. Mayer, head of defendant's studios, and one with Howard Strickling, defendant's public relations director, appear in the record.¹³ The first of these took place probably in July or August, 1947, between Mr. Mayer and plaintiff in the former's office. On that occasion Mr. Mayer told plaintiff of the visit made by the Committee's investigators on Mr. Mannix in which the company had been requested to discharge another writer and plaintiff because they were Communists and to which request Mannix replied that he did not "know whether they are Communists or not," that no crime had been committed and that he would hire them if they did the work required of them;¹⁴ and that Mr. Mayer intended to tell the investigators the same thing. Mr. Mayer spoke of the plans he had for plaintiff at the studio, expressed the wish "that all this business, talk about people being Communists did not arise . . . ," and hoped that plaintiff would curtail his activities in the Screen Writers Guild. Mr. Mayer recalled asking plaintiff why he did things which caused him to be branded as

¹³Both plaintiff and Mr. Mayer testified to these conversations. For the most part their respective versions were complementary rather than contradictory of each other. The summary which follows, therefore, is an amalgam of the two versions. Conflicts, where there were any, are noted. The significance of these conversations is that in charging on the subject of waiver the trial court made specific reference to a part only of this testimony, ignoring that part of it, as well as other evidence, which tended to a finding of non-waiver. [Point I, C, 2, 6, *infra*, pp. 80-2, 93-4.]

¹⁴This third-hand hearsay report (from Mannix to Mayer to plaintiff) of what transpired between Mr. Mannix and the investigators is at variance with Mr. Mannix' direct and uncontradicted account of the actual occurrence. According to him the investigators merely asked whether he knew if these writers were Communists, to which he replied, "No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts. . . ." [R. 289, 298-301.]

a Communist to which plaintiff's rejoinder was, in substance, that he was not a Communist but having been born in poverty he sided with the underprivileged. In that connection plaintiff recounted an anecdote about his father who, after having been a rabid and active Socialist became the owner of a tie shop. He presented plaintiff with a number of ties which did not bear the union label and justified its absence by the remark that "unions are no good for small plants. . . ." [R. 348-51, 440-43.]

Reference was also made in this conversation by plaintiff to the differences between himself and a James K. McGuinness (an executive of defendant) and the latter's asserted use of the smear technique in stirring up strife and bringing about the Congressional investigation.¹⁵ [R. 442-3, 519-22.]

While on the train returning from the Washington hearing plaintiff spoke with Howard Strickling. The latter told him that Mr. Mayer was terribly upset over the results of the hearing, and they discussed the bad treatment which Mayer had received at the hands of the Committee. Strickling went on to say that "he was terribly upset particularly about the effect of this" on Mr. Trumbo and plaintiff and that he was seeking some public relations formula—some statement we could make which the studio could publicize or some other method—which would overcome what he felt was a bad press, and "whereby we could, Mr. Trumbo and myself, get out of this." Mr. Strickling also said that he wanted plaintiff to give

¹⁵Mr. McGuinness testified, without contradiction, that he had not named plaintiff in his testimony before or discussions with the Committee, that he had not requested or asked anyone else to request the holding of any investigation, and that he had never opposed plaintiff's employment by defendant or expressed any opinion with respect thereto. [R. 749-65.]

the matter some thought and that when they got back to the studio they would get together and see what could be worked out along those lines. He also told plaintiff that Mr. Mayer, who was on the train, wanted to see plaintiff. [R. 574-6, 682-3.]

Mr. Mayer and plaintiff then had a discussion. The former's recollection of that conversation follows [R. 362-3]:

"We talked about the hearing and I said it is very unfortunate; that I thought he acted very unwisely and had bad advice, because, if he belongs to the Communist Party, the FBI no doubt has got a record of it, and it was no crime, as I saw it, to belong to the Communist Party at the present time, and he should have answered. Well, he thought some personal rights were involved. And I said, 'You could have told the chairman that "I am advised you have no right to ask me these questions but I can't afford not to answer them. No; I am not a Communist" or "I am a Communist or belong to the Communist Party but I never heard anything subversive or any violence or I would have walked out on them, which ever the case may be, and then you are clear. You wouldn't have any problem on your hands.'" 'Well, he said, 'I had to stick with the gang. They agreed to do it that way and I had to be with them.' I said, 'It was unfortunate,' or words to that effect. I can't recall exactly but the essence was what I told you.

* * * * *

"If I remember right, I told him I thought he had a great opportunity if this thing hadn't sprung up, but I didn't know what this would do, where it would take us. I think that brought his answer that he had to stick with the crowd or the other fellows and couldn't break away from them."

Plaintiff made no direct denial of this testimony. He did, however, testify that Mr. Mayer said that this matter placed him [Mr. Mayer] in a position where it would be rather difficult for him to go through with the plans that he had had in regard to making plaintiff an executive; but that nothing was said *directly* in regard to plaintiff's conduct before the Committee. [R. 489.] Plaintiff also testified that in this conversation Mr. Mayer was upset over the treatment accorded him, Mr. Trumbo and plaintiff by the Committee; but, in narrating the same conversation in his deposition, no reference was made by plaintiff to any such discussion with Mr. Mayer. [R. 487, 572-89.]

On arriving in Los Angeles, following his conversation with Mr. Strickling about public relations, and after he had learned of the statement of policy adopted by the motion picture companies on November 25, 1947, relating to employment of the ten unfriendly witnesses, plaintiff prepared, and on November 28, 1947, executed an affidavit. [R. 687-9.] It reads as follows [R. 688-9]:

“STATEMENT

“On October 30, 1947, I appeared as a witness in Washington, before the Thomas-Rankin Committee. In a prepared statement, under oath, I was refused permission to say that I was a loyal American citizen, who upheld the Constitution of the United States, who did not believe in violence and force to overthrow our government, and who was not an agent of a foreign power.

“Since childhood, in our public schools, I have given my oath of allegiance. I always will, and now do so again:

“I pledge allegiance to the Flag of the United States of America and to the Republic for which

it stands; one nation indivisible, with liberty and justice for all.

“In taking this pledge, I further solemnly swear that I will continue to resist, with all my strength, under all pressure, economic and social, the current drive to subvert this pledge, in spirit if not in letter, to read: ‘I pledge allegiance to the Thomas-Rankin Committee, and to the anti-democratic forces for which it fronts; one nation divided, with fear and insecurity for all.’”

A copy of this affidavit was sent by plaintiff to Mr. Strickling and one to Mr. Mayer. [R. 689.]

5. Plaintiff's Awareness of the Possible Consequences of His Conduct.¹⁶

Plaintiff was present at and heard substantially all of the testimony given before the Committee at the Washington hearing. Before plaintiff had taken the stand, therefore, he heard Mr. Mayer testify that the latter was unalterably opposed to Communism; that Communists should be denied the sanctuary of the freedom they sought to destroy; that he hoped a law would be passed regulating employment of Communists in private industry; and that if he knew that men employed by him believed in and subscribed to the doctrine of Communism he would not keep them in his employ. [R. 363-7, 505-6, 513-19.]

¹⁶The significance of this testimony is two-fold. In the first place it is part of the evidence, to which the trial court did *not* direct the jury's attention, bearing upon the question whether plaintiff was justified in believing that nothing would happen to him if he conducted himself as he did. [Point I, C, 2, 6, *infra*, pp. 80-2, 93-4.] And in the second place it tends to establish the wilful nature of that conduct and plaintiff's contemplation of the consequences which might ensue from it.

He also heard Mr. Johnston testify that if the evidence regarding the Communistic affiliations of John Howard Lawson (one of the unfriendly witnesses) was true Mr. Johnston would not employ him because he would not employ any proven or admitted Communists as they could be a disruptive force in the motion picture industry.¹⁷ [R. 506-13.]

Plaintiff, before he took the stand, heard the testimony of the other nine unfriendly witnesses. He knew, therefore, of the line of inquiry which had been pursued by the Committee with respect to those witnesses and considered and discussed with them the possibility that the same line would be pursued with him. [R. 533-40, 645-8.] He heard the Committee Chairman announce that by unanimous vote a subcommittee had recommended that Samuel Ornitz and Herbert Biberman (two of the unfriendly witnesses) be cited for contempt; and he considered the possibility of being himself cited for contempt if he testified as he expected to testify; although in another part of his cross-examination he said that he did not consider that possibility. [R. 646-8.]

Efforts, on cross-examination of plaintiff, to show his knowledge or awareness of the state of public opinion in this country with respect to Communists and Communist sympathizers were cut short upon plaintiff's objection; as were also efforts to show that his real reason for refusing to answer the Committee's questions was not the high duty of preserving constitutional rights professed by him, but rather a desire not to admit Communist Party membership. [Point II, D, *infra*, p. 118.]

¹⁷Mr. Johnston was characterized below as the "spokesman" for the motion picture industry. [R. 798.]

6. Defendant's Claimed Course of Conduct.

In addition to the portion of the conversations with Mr. Mayer to which the trial court particularly directed the jury's attention, the rendition of services and payment of salary after the hearings, and other matters which have already been narrated, the basis for the claim of waiver or condonation in this cause is thought to be found in plaintiff's knowledge of certain statements by representatives of the motion picture industry which plaintiff heard or read before he took the stand in Washington. Included in this category was an open letter to Congress signed by Mr. Johnston and published as an advertisement in a number of newspapers. The gist of that letter was a suggestion that Congressional investigative procedure be overhauled so as to make secure the rights of individual citizens, protect them against defamation and smearing, and give them an adequate opportunity to be heard. [R. 453-7.]

There were also a number of press or radio statements issued by Paul V. McNutt, counsel for the Motion Picture Association at the hearing. In one of them Mr. McNutt commented, as of the close of the session for October 21, 1947, to the effect that the industry insisted there was no Communistic propaganda in its pictures, that the hearings had demonstrated this so far, and that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers and other studio employees as such action would not be in accord with an announced policy of Congress or rulings of the Supreme Court. [R. 459-60.]

Another of these statements was a radio address in which Mr. McNutt dwelt on the application of the principle of free-speech in its relation to the Congressional investigation and repeated the industry's claim that its motion pictures contained no subversive propaganda. [R. 462-3.] Again, in a press statement, Mr. McNutt declared that he was shocked to see the violence done to the principle of free speech during the Committee's session of October 23, 1947, that it was apparent that the purpose of the Committee was to dictate and control the content of motion pictures, and that the industry would continue to fight for a free screen. Another statement along the same lines was issued a few days later. [R. 463-4.]

There was also testimony at the Washington hearing by Mr. Johnston which plaintiff heard, in which Mr. Johnston told of suggesting, in June, 1947, a program for the Motion Picture Association part of which was the denial of employment to known Communists, but which was not adopted. One of the reasons for not adopting this part of the program was the advice of counsel that to join together to refuse to hire someone would be a potential conspiracy.¹⁸ [R. 809-12.]

¹⁸When the statement of policy was adopted in New York on November 25, 1947, it was with the legal advice and concurrence of former Justice James F. Byrnes and other counsel. [R. 787-8, 356-7.]

C. The Trial Court's Rulings and the Special Verdict, Findings and Judgment.

1. A special verdict in the form of four questions was submitted to the jury. The questions, together with the answers given by the jury, were as follows [R. 163-4]:

“Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer ‘yes’ or ‘no.’)

Answer: No.

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer ‘yes’ or ‘no.’)

Answer: No.

Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer ‘yes’ or ‘no.’)

Answer: No.

Question 4: Did the defendant Loew's Incorporated by its conduct towards the plaintiff, subsequent

to the hearing, waive the right to take action against him by suspending him? (Answer 'yes' or 'no.')

Answer: Yes."¹⁹

Although a general verdict was not submitted to the jury, they were elaborately charged upon the substantive law thought to be applicable to the case.²⁰ [R. 133-61, 891-920.] The respects in which that charge is claimed to be erroneous are sufficiently set out in the Specification of Er-

¹⁹This question was submitted, at plaintiff's request, and over defendant's objection that it was outside the issues. [R. 946.] It should also be noted that while it confines the question of waiver to defendant's conduct *subsequent* to the hearing, the charge expressly permitted consideration of evidence of defendant's conduct *before*, as well as after, the hearing. [Point I, C, 4, *infra*, pp. 85-8.] On the other hand, comparison of the issues, as defined in the pretrial order [*supra*, pp. 8-9], with the first three questions submitted, at defendant's request but in modified form, will show a substantial narrowing of the controversy as a result of that modification—the question of plaintiff's conduct, *in concert with others* having been eliminated. [See, Point II, A, *Second, infra*, p. 112.]

²⁰Ordinarily, when only a special verdict is to be returned, it is not necessary to charge generally upon the law of the case. Rather the charge is confined to those directions needed to explain the matter submitted to the jury and enable them to make their findings, as distinguished from instructions on the substantive law usually necessary to the rendition of a general verdict. [F. R. C. P., rule 49a; *Lipscomb*, Special Verdicts Under The Federal Rule, 25 Washington Univ. L. Q. 185, 3 F. R. Serv. 747, 752-3; *Nordbye, D. J.*, Use of Special Verdicts, 2 F. R. D. 138, 139-41.] Conforming to this practice, defendant confined its requests to instructions relating to the manner of deliberation, the nature and effect of inferences and presumptions, facts admitted or judicially noticed and the like. [R. 124-30.] Plaintiff, however, requested a large number of instructions on the substantive law, many of which were given as requested or in substance. [R. 101-24.]

rors. [*Infra*, pp. 45-67; see, also, Point I, *infra*, pp. 68-109.]

2. The trial court adopted the jury's verdict and in addition made extensive findings of its own. [R. 169-79.] Upon the findings and conclusions thus drawn a judgment was entered. It declared that defendant had no right to suspend plaintiff's employment or compensation; that the stated grounds of suspension were not valid and that plaintiff had not violated the public relations clause of the employment contract. [R. 187-8.] Plaintiff was awarded judgment in the sum of \$76,500 for compensation to December 30, 1948. Defendant was ordered to reinstate plaintiff to his employment or, upon failure to comply with that direction, to pay plaintiff the sum of \$1350 per week from December 30, 1948 to November 15, 1949, for each week plaintiff continues to be ready, willing and able to perform his services. Defendant was also ordered to take appropriate action to set the suspension notice aside, and was enjoined from continuing it in effect. The court reserved jurisdiction for the purpose of enforcing the judgment so rendered. [R. 188-92.]

3. Various of the trial court's rulings on the admission and exclusion of evidence are claimed here to be erroneous. The specific rulings in this connection are adequately set out in the Specifications of Errors, *infra*, pp. 39-45, and so are not repeated at this point. [See, also, Point II, *infra*, pp. 110-21.]

D. The Disqualification of the Trial Judge.

On March 22, 1948—some eight months before the trial and within six days of the time when defendant received the information upon which its application was based—the defendant filed an affidavit and application for transfer of the cause to another District Judge upon the ground that the Honorable Leon R. Yankwich, before whom it was pending, was disqualified for personal bias and prejudice against the defendant. [R. 43-6.] That application was grounded on the allegation that Judge Yankwich, before the cause had been commenced but after the events which gave rise to the litigation had occurred, expressed the opinion, at a social gathering, “that there was no legal justification for the suspension or discharge of any of the persons whose conduct before the Committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him but if they did he would have no alternative but to render judgment for the plaintiffs in such actions; and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars. . . .” [R. 44.]

Judge Yankwich, recognizing that under the Federal practice these allegations had to be taken as true, nevertheless filed counter-affidavits in which the making of the statements attributed to him was controverted. [R. 58, 68-76.] He then denied the application for transfer upon grounds set forth in a written opinion, and continued thereafter to preside over the cause. [R. 47-76, 77, 168-9.]

SPECIFICATION OF ERRORS.

1. The trial court erred in refusing to admit evidence offered by defendant showing the conduct and testimony of each of the unfriendly witnesses before the Congressional Committee, including the fact that each had refused there to answer a question as to whether they were or ever had been members of the Communist Party; which evidence was objected to by plaintiff and by the Court on its own motion on the following grounds [R. 651, 721, 731, 828]:

“Q. Did you know, before Mr. Lawson took the stand, that Mr. Lawson proposed to read, if he were permitted to do so, a statement he had prepared?

Mr. Katz: We object to that on the ground it is immaterial.

* * * * *

Mr. Selvin: At this time, may it please the court, we should like to offer in evidence a motion picture showing, substantially in the same form as did the picture of Mr. Cole shown yesterday, the testimony and conduct before the Un-American Activities Committee of all of the 10 men who have heretofore been referred to in evidence. I understand that it is agreed that the proposed motion picture correctly reflects the proceeding but that substantive objections otherwise are reserved.

Mr. Katz: To which, on behalf of the plaintiff Lester Cole, we interpose the objection on the ground that it is immaterial. This is an action involving Mr. Lester Cole's contract with his employer and in the notice of suspension it is Mr. Cole's acts and conduct for which his contract is sought to be suspended. We object to that on that ground, in the light of the contract itself, the notice of suspension that was sent, and the fact of the statement of Mr. Cole, and the

picture of Mr. Cole before that committee has already been exhibited. There is no materiality at this time, at least at this stage of the proceedings, what nine or 10 or any number of other persons may or may not have said or done before the committee.

* * * * *

Mr. Selvin: Now, we will at this time renew our offer with respect to that film.

The Court: It will be rejected. I know what you are trying to do. You will have to prove it. You will have to bring Mr. Schenck here and prove that he actually saw the picture and what he acted on.

* * * * *

Mr. Selvin: You would not allow the testimony of the conduct of the ten?

The Court: Not other than what is already in.

Mr. Walker: Your Honor, you would not allow the showing of the pictures?

The Court: I wouldn't allow the showing of the pictures of the other nine men.

Mr. Selvin: Or the reading of the transcript?

The Court: No." [Point II, A, *infra*, pp. 110-12.]

2. The trial court erred in refusing to admit evidence offered by defendant as to the observations of qualified witnesses with respect to the public attitude toward Communism, the Communist Party and the conduct of plaintiff before the Congressional Committee, to which evidence plaintiff objected on the following grounds [R. 829-44, 357-8]:

"Mr. Katz: To which we object on the ground it is incompetent, irrelevant and immaterial. If this producer wanted to discharge Mr. Cole because it believed it could prove that he advocated the overthrow of the government by force and violence or that he was a Communist, it should have done so

and joined the issue. Knowing that it could not establish any such proof, it gave a notice in which it resorted completely to the terms of the morals clause. The morals clause refers specifically to an act of Mr. Cole before the House Committee on Un-American Activities and his acts and conduct there. That was the limit of the notice of suspension. And we object on the ground that it is an attempt to bring into this case extraneous matters.

* * * * *

Q. (By Mr. Walker): Prior to the time, Mr. Mayer, that you joined in as you have indicated the adoption of this statement of policy which was formed at the meeting at the Waldorf-Astoria in October—in November of 1947, what had been your observation of public opinion with reference to the hearings in Washington and particularly that portion of the hearings in which the questions were asked by the Committee and not answered by certain of the parties, including Mr. Cole?

Mr. Katz: We object to that question upon the ground that no proper foundation has been laid. It is incompetent and immaterial.

The Court: I don't think it is proper examination as to the matter before the court at the present time. . . ." [Point II, B, *First, infra*, pp. 113-15.]

3. The trial court erred in excluding from evidence Defendant's Exhibits G and H, consisting of a compilation of editorials from newspapers throughout the country commenting upon the Committee investigation and unfavorably upon the conduct of plaintiff and his confederates thereat, as follows [R. 782-4, 823]:

"The Court: . . . I do not think, in view of the long arguments that we have had, it will take any additional extensive argument, and I say now that I

am satisfied, more than ever . . . that the editorials cannot be shown.” [Point II, B, *Second, infra*, p. 115.]

4. The trial court erred in refusing to admit evidence offered by defendant that the Communist Party of America advocates the overthrow of our present form of government by force and violence and is the agent of a foreign power, to which evidence plaintiff objected on the following grounds [R. 829-44]:

“Mr. Katz: To which we object on the ground it is incompetent, irrelevant and immaterial. If this producer wanted to discharge Mr. Cole because it believed it could prove that he advocated the overthrow of the government by force and violence or that he was a Communist, it should have done so and joined the issue. Knowing that it could not establish any such proof, it gave a notice in which it resorted completely to the terms of the morals clause. The morals clause refers specifically to an act of Mr. Cole before the House Committee on Un-American Activities and his acts and conduct there. That was the limit of the notice of suspension. And we object on the ground that it is an attempt to bring into this case extraneous matters.” [Point II, C, *infra*, pp. 116-17.]

5. The trial court erred in refusing to permit defendant to cross-examine plaintiff as to whether he was a member of the Communist Party and whether that fact was not his real reason for refusing so to testify before the Congressional Committee, to which line of inquiry plaintiff objected on the following grounds [R. 595-603, 613-17, 674-77]:

“Mr. Katz: To which we object upon the ground it is irrelevant and immaterial for the reason, among others, that the notice of suspension itself assigns as

a cause for the suspension certain conduct before the House Committee, and an asserted refusal to answer questions does not assert that Mr. Cole was or was not a member of the Communist Party; upon the further ground that the record already shows that, in so far as this employer is concerned, out of the lips of the principal officers of this employer, not contradicted, they have declared that, in so far as employment at Loew's was concerned, it did not make any difference to them that Mr. Cole was or was not a Communist or was or was not being charged with being a Communist; and upon the final ground that, in the light of the fact that the suspension does not specify as a ground therefor the claim that Mr. Cole was a Communist or was not a Communist, any inquiry into that area is not germane to any issue which the court or the jury must ultimately pass upon.

* * * * *

The Court: The objection is sustained.

Mr. Walker: Wasn't your real reason for failing to state, in response to the referred to question of the Committee, whether you were a Communist, because of your unwillingness to admit that you were a Communist rather than for the reasons that you have heretofore assigned for your conduct?

Mr. Katz: We object to that question on the ground it is immaterial, argumentative and incompetent.

The Court: The objection is sustained. . . ."
[Point II, D, *infra*, p. 118.]

6. The trial court erred in limiting defendant's cross-examination of plaintiff so as to preclude defendant from inquiring into plaintiff's knowledge and awareness, before he testified at the Committee hearing, of the state of public feeling toward Communism and the Communist Party and

its members, to which line of inquiry plaintiff objected on the following grounds [R. 590-619]:

“Mr. Katz: Just a moment. We are going to object to that on the ground it is incompetent, irrelevant and immaterial.

* * * * *

Mr. Katz: Our further grounds would be that they are vague and that they call for a conclusion of the witness as well as being immaterial and incompetent.” [Point II, E, *infra*, p. 119.]

7. The trial court erred in overruling the objections of defendant to, and admitting evidence offered by plaintiff of, the facts that plaintiff’s salary had been paid, and motion pictures on which he had worked had been distributed, after the Congressional Committee hearing, which evidence was objected to by defendant on the following grounds [R. 694-6, 863-7]:

“Mr. Selvin: We object to that upon the ground it is immaterial and not proper redirect and not within the issues.

* * * * *

Mr. Selvin: And upon the further ground that no proper foundation has been laid in this: that the figures by themselves offer no standard or criterion to determine whether anybody did or did not see this picture because of the conduct in question. They merely reflect gross showings.

* * * * *

“Mr. Selvin: Yes, but the mere fact that the picture was exhibited would have no tendency at all to show any waiver, because among other reasons under the contract, even if the contract were wholly terminated for cause, the right to continue showing pictures, based upon Mr. Cole’s work, would continue,

because Mr. Cole's work was absolutely acquired under the contract. So that the continuation of the pictures is no evidence of any adoption or confirmation of the contract or of any relaxation of the contract or of any intention, with knowledge of facts, entitling one to terminate it altogether. Now, the question of exhibition of the picture has nothing to do with the termination or non-termination of the employment." [Point II, F, *infra*, pp. 120-21.]

8. The trial court erred in charging the jury as follows [R. 897, 901-4]:

"II.

THE NATURE OF THE ACTION AND THE CONTRACT.

* * * * *

"In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to, namely, his appearance before the Congressional Committee, was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or tend to shock and offend the community and/or brought the plaintiff, or tends to bring the plaintiff, into public scorn and contempt as herein defined.

"The verb 'to prejudice' also appears in the clause of the contract by which the plaintiff agrees, among other things, not to do or commit any act or thing that will 'prejudice the producer or the motion picture, theatrical or radio industry in general.'

"The verb 'to prejudice' is defined as follows: 'To injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage, injure, impair, as to prejudice.'

“In respect to those words also, you must determine whether the conduct of the plaintiff was such that you, as jurors, can say that, under our American standards of right conduct, which are accepted by the community of which you are a part, it was conduct which would injure or damage the defendant. And, in determining whether it would have such effect, you must consider whether the conduct would be considered an attack or reflection on the reputation of the defendant in its method of conducting its affairs through the employment as a writer of a person who acts as the plaintiff did under the circumstances. Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed.

“I have made an addition, so I will reread that paragraph. Strike out what I have said beginning with ‘Even lawful actions.’

“Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed, that is, that the suit was not brought within a certain period of time prescribed by law. A person holding high views of business or commercial ethics might be critical of one who makes such a defense. But it could not be said that the community as a whole or a good portion of it would be shocked or offended by the fact or that it would subject the person making such defense permitted by law to public scorn or contempt.

“Unless forbidden by State or Federal law, or by the courts as against public policy, an employer might, as a condition of employment, require, in a written contract, that an employee do not perform, during the course of the employment, certain acts which are not in themselves illegal. In such event, the employer might, if the employee violated the condition, during the period and time of employment, consider it a breach and take whatever steps he may be allowed under the contract.

“And in a lawsuit arising from such a controversy, the only factual situation involved would be whether the designated prohibited act was actually committed. But when, as here, the prohibited conduct is not named specifically in the contract of employment, but is defined as conduct having a certain effect, then the jury is called upon to determine, as you are called upon here, as questions of fact:

“1. Whether the conduct was of the character forbidden by the contract; and

“2. Whether the employee was guilty of such conduct.

“You are instructed that the burden is on the defendant to prove by a preponderance of the evidence sufficient justification, in accordance with the instructions of the court, for suspending Mr. Cole. This means that before you can find that the defendant was so justified or that plaintiff conducted himself in a manner contrary to the morals clause of the contract, you must be satisfied by a preponderance of the evidence that every fact essential to show such justification is true.

“Therefore, unless such justification is established by a preponderance of the evidence you must find that the plaintiff did not conduct himself in such a

manner as to bring himself into public scorn, hatred, contempt or ridicule, or that his conduct had any of the other effects in the clause.

“In considering whether Lester Cole’s conduct had such effect, you are not to speculate or to guess. If you are not satisfied by a preponderance of the evidence that such was the fact, you are to find that his conduct did not have any of the effects stated in the clause.

“In determining whether the conduct of Lester Cole had such effect, or if it had any, you are to consider only the period between October 30, 1947, and December 2, 1947.

“An employer cannot penalize an employee simply by claiming a violation of a contract by the employee. In order to justify a claim of violation and a suspension or other penalty allowed by the contract, the employer must show that the employee’s act charged as violation was done or committed by the employee and that it was done wilfully and intentionally. Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt or ridicule, or to shock the community or prejudice the defendant, you must find from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had that effect, was wilful and intentional and actually had that effect.”

to which instruction the defendant objected on the following grounds [R. 924-30]:

“Mr. Selvin: Referring, first, your Honor, to the subdivision of the instructions which was numbered II, that is, the nature of the action and the contract, the instruction in that subdivision which told the jury, in effect, that they must be able to say that, under our

American standards of right conduct, the plaintiff's conduct and his appearance before the Committee must be shown to shock, offend and insult the public and to bring himself into public scorn, contempt and so forth, our objection to that particular instruction is that it requires the defendant to show that the conduct had the effect and not merely, as the contract provides, that it had the tendency to produce that effect.

* * * * *

"Mr. Selvin: To go on to the next point, still in Subdivision II of the charge, where your Honor was discussing the burden of the defendant to prove jurisdiction [justification], we object to that instruction because in the form given it leaves to the jury not a question of whether the facts claimed to constitute the justification occurred but whether or not there was justification as a matter of law.

* * * * *

"Mr. Selvin: In the immediate following matter on which your Honor touched, to the effect the jury should not speculate as to whether Cole's conduct had the effect claimed for it but must determine it from the evidence, the instruction in the form given we contend carries the implication that what they must determine is whether it actually had that effect and, therefore, eliminated the proposition that it was sufficient if it tended to have that effect. I am referring, of course, to the question of whether it shocked or offended the community." [Point I, E, *infra*, pp. 101-5.]

9. The trial court erred in charging the jury as follows [R. 905-7]:

“III.

THE LAW OF CONTRACTS BETWEEN MASTER AND
SERVANT OR EMPLOYER AND EMPLOYEE.

* * * * *

“An employer may consider a contract of employment breached by the employee when the employee fails to perform his duty under it or breaches the express or implied conditions in the contract, even though injury does not result to the employer in consequence of the employee’s breach. But the reason given for the action must be true, from the standpoint of the employer acting in good faith.

“And where the contract specifies the grounds for its termination or suspension, and written notice of such ground is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. If he does not do so, by a preponderance of the evidence, he cannot justify his action upon other grounds named in the contract which, although true, were not stated in the notice.

“In performing his duties under the contract, the plaintiff was required to comply substantially with its terms.

“To apply these rules to the facts here: The plaintiff Lester Cole was employed by the defendant, Loew’s, Incorporated, under a written contract of employment; that contract ran until November 15, 1949, with certain options. Where, as here, an employer suspends an employee during the term of his contract, the law requires that the employer justify that suspension by a preponderance of the evidence. In this case, the defendant having notified the plaintiff that it sus-

pended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself into public scorn, hatred, contempt or ridicule, it is necessary for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole personally so conducted himself that he was held in public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced the defendant or the industry in general.”

to which instruction the defendant objected on the following grounds [R. 943-4]:

“Mr. Selvin: The next one I propose to take up in the charge, which I think follows the one just discussed, is where you refer to the fact that where the contract specifies or requires a written notice—

The Court: That is right.

Mr. Selvin: —the justification must be confined to the grounds specified. Our objection, in the first place, is that if there is in fact a justification, the employer’s good or bad faith is immaterial, whereas, this instruction requires good faith.

Another objection is that the instruction is inapplicable to the facts of this case because the contract here does not require a written notice of the grounds of suspension.

* * * * *

Mr. Selvin: And the general objection to it is that we take the position that we can justify on any of the grounds which actually existed at the time whether known to us or otherwise.

The Court: You can argue that to someone else, because I am satisfied.

Mr. Selvin: Then, in that same subdivision where your Honor states that the application of those rules to the facts require certain findings—

The Court: Yes.

Mr. Selvin: —our objection to that portion of the charge is that again the tendency of the acts to have the effect is eliminated and it is their actual effect which is—

The Court: No. I am sorry. You misconceived that and I am not surprised, . . .” [Point I, E, *infra*, pp. 101-5.]

10. The trial court erred in charging the jury as follows [R. 907-10]:

“IV.

THE ACTS OF THE EMPLOYER CONSIDERED AS
WAIVER.

“An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligations as an employee.

“If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee’s obligations.

“If Mr. Cole, in good faith, in this case did come to the conclusion, from the actions and the statements of the executives of the defendant, Mr. Mayer and Mr. Mannix, and you so find as a fact, that Mr. Cole could conduct himself as he thought proper before the congressional committee, assuming that you find such actions took place and such statements were made,

you are instructed that Cole had the right to use his best judgment as to what his conduct before the Committee should be.

“Or, to put it differently and more explicitly:

“If you find that the defendant’s executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist—and Mr. Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee—but that the defendant’s executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and gave them—just a minute. Strike out ‘and gave them’.

“I made some changes, so I will start this over again:

“Or, to put it differently and more explicitly: If you find that the defendant’s executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist, and gave him no specific instructions as to how to conduct himself in the matter—and Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee—but that the defendant’s executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and without giving him any specific instructions as to how to act, then I instruct you that Cole had the right to pursue the conduct he had decided upon on the basis of the

prior acts and statements referred to, if you find them to be true and to have existed, without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist.

“In this case, the plaintiff Lester Cole agreed in his contract with Loew’s, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

“If you find that the defendant Loew’s knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the defendant desired that plaintiff Lester Cole conduct himself before the Committee in a certain manner, the defendant Loew’s had the right to give reasonable and specific instructions to Lester Cole.

“I will read the last paragraph over again, as I have modified it—I will read the whole instruction over again.

“In this case, the plaintiff Lester Cole agreed in his contract with Loew’s, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

“If you find that the defendant Loew’s knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the defendant Loew’s desired that plaintiff Lester Cole conduct himself before the Committee in a certain manner, the defendant Loew’s had a right to give reasonable and specific instructions to Lester Cole and that it was his duty to follow them, if they were reasonable, as the contract provides.

“You are instructed that even if an employer has the right to suspend an employee under a contract, he may, by his words or conduct, and without reference to any act or conduct of the party affected thereby, waive this right. A waiver is such conduct of the employer as shows his election to forego the right to suspend, which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the particular conduct is concerned, and cannot be claimed by him, except for some other or different violation by the employee.

“To put it into a brief sentence: An employer knowing of an employee’s conduct which might warrant suspension or termination of employment may not continue employing him thereafter and at a later date treat the employee’s conduct as a breach of his obligations.

“So, here, if you find that when Cole came back from Washington, Loew’s knew of Cole’s statements and conduct before the House Committee in Washington in connection with the particular hearings, but nevertheless, put him back to work, and accepted his services with the intention of accepting Cole as its employee under the employment contract, then I instruct you that Loew’s waived the right to rely upon such conduct in taking action against Cole.”

to which instruction the defendant objected on the following grounds [R. 945-50]:

“Mr. Selvin: Subdivision IV, the acts of the employer considered as waiver. There are certain general objections which we have to apply to the entire subdivision, first, that it permits the jury to consider, on the question of waiver, conduct or alleged conduct of the defendant occurring prior to the hearing.

* * * * *

“Mr. Selvin: In so far as conduct prior to the hearing is instructed upon in this subdivision, it, in our opinion, is relevant, if at all, only on the theory of estoppel and the jury had not been told the elements of the law of estoppel.

* * * * *

“Mr. Selvin: Our third point is that neither estoppel nor waiver was pleaded or made an issue in the case.

* * * * *

“Mr. Selvin: Our fourth objection is that, in so far as waiver is concerned, the jury has not been instructed that waiver is a question of intention and has not been told that, before one can be held to waive it must appear that, with knowledge of his right, he took certain conduct and intended to waive that right.

* * * * *

“Mr. Selvin: Still on Subdivision IV, we object upon the ground that the instruction singles out for specific mention the testimony of Mr. Mayer and Mr. Mayer’s and Mr. Mannix’ statements to Mr. Cole before he left for Washington, leaving unmentioned the statements of Mr. Mayer and of Mr. Johnston in a similar connection, which it was testified he heard before he took the stand. Again, on Subdivision IV—

* * * * *

“Mr. Selvin: We also object to that portion of the charge upon the ground that it makes the determining, or one of the determining, factors the question of whether Mr. Cole, in good faith, assumed that he was free to act and leaves out of consideration the question of whether he was justified in so

assuming on the basis of what was told him or he heard.

* * * * *

“Mr. Selvin: Then, in this same subdivision, where your Honor has charged the jury that the defendant knew Mr. Cole was subpoenaed, and if it desired any particular line of conduct on his part, it had the right to instruct him, we object upon the ground, first, that the instruction as given carries the implication that, if they did not give him any instructions or directions, they waived any right to complain of his conduct afterwards—

* * * * *

“Mr. Selvin: And, second, in respect to that same instruction, upon the ground that, in our opinion, an employer does not have the right to instruct an employee as to how he shall testify before a Congressional Committee.

* * * * *

“Mr. Selvin: Then the concluding instruction in that subdivision we object to upon the ground it is not only a formula instruction which eliminates certain essential elements necessary to reach the result but it is, in view of the undisputed facts in the case, in effect, an instruction to return a verdict in the plaintiff's favor and particularly in that it eliminates from the consideration of the jury the proposition that the mere fact that the employee may be retained for a period of time after the alleged violation occurred does not in and of itself necessarily constitute a waiver, and because it further eliminates from the consideration of the jury in that regard the proposition that the conduct here complained of is a persistent conduct and continued, as we contend, up to and be-

yond the time the employer took the action complained of by the plaintiff.” [Point I, C, *infra*, pp. 78-94.]

11. The trial court erred in charging the jury as follows [R. 911-13]:

“V.

THE RIGHTS OF WITNESSES BEFORE
COMMITTEES.

* * * * *

“In exercising the right of inquiry, a Congressional Committee may subpoena witnesses and ask them questions relevant to the inquiry. However, a witness examined before the Committee also has rights. He may decline to answer certain questions in order to secure from the courts a final determination of the right of the Committee to ask the particular question. When he does so, he paves the way for contempt proceedings in the courts, and not before the committee, where, that is, in the courts, a final decision as to the power of the committee in the particular respect can be obtained.

“When a question is asked of a witness before a committee, he may give either a direct or an irresponsible answer. If the question is of such character as to require an explicit answer, he may be directed to give such answer. But he cannot be required to answer in a specific manner and without being given an opportunity to explain his answer. Nor can he be denied the right to amplify it. And there is nothing wrong if the answer which the witness gives goes beyond the question, or is what we call in law non-responsive.

“A non-responsive answer, if it includes irrelevant matter, may be stricken. If it contains relevant facts, they are admissible, notwithstanding the fact

they were not specifically asked for or called for by the particular question.

“When a witness is called before a Congressional Committee he has a right to invoke the protection of the Constitution and of the laws of the United States, and to that end he has the legal right guaranteed to every citizen or legal resident of the United States to assert rights reserved by the Constitution and the law and to claim their privileges.

“In this respect, the Supreme Court has said:

“‘An official inquisition to compel disclosures of fact is not an end, but a means to an end; and the end must be of a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.

“And before a witness can be guilty of contempt of a legislative committee two conditions must occur:

1. The questions asked of the witness must be relevant to the purpose of the inquiry, that is, it must be required in a matter into which the committee has the jurisdiction to inquire, and

- “2. The witness must actually refuse to answer the relevant question.

“Or, conversely put:

“A witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

“Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional or other legal rights.

This is one of the privileges and incidences of American citizenship.

“I will reread the first sentence, because I have modified the last sentence:

“Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional or other legal rights. This is one of the privileges and incidences of American citizenship.

“And even the alien in our midst, if he be a legal resident, has certain rights and privileges which he may assert and which it is the duty of a legislative committee to respect and of the courts to protect.”

to which instruction defendant objected on the following grounds [R. 951-2]:

“Mr. Selvin: The objection which extends to all of Subdivision V is that it is irrelevant to the issues of fact to be submitted to the jury. The question for the jury to determine is whether or not the conduct complained of occurred, and in the form it is now to be presented, whether or not, if it occurred, the defendant has waived its rights in respect to that. The question of what the plaintiff's rights before the Committee might have been are not involved in the question of whether the conduct had the effect complained of and, if so, whether it has been waived.

“We object further upon the ground that, whatever may be the technical description of the right or power of a person to precipitate a legal test by refusing to answer a question before a committee, the fact [is] that a refusal to answer a pertinent question is a criminal violation of the law of the United States and is not included in the discussion of the

rights of witnesses and it should be included if the subject is to be fully stated at all.

* * * * *

“Mr. Selvin: We object further to that subdivision of the charge on the ground that as given it, in effect, submits to this jury the legal question as to whether or not what Mr. Cole did was a contempt of Congress as distinguished from the question as to whether or not his conduct, whether lawful or unlawful, had the effects contended for it.” [Point I, D, *infra*, pp. 95-100.]

12. The trial court erred in charging the jury as follows [R. 915-18]:

“VII.

THE QUESTION OF COMMUNISM.

“In view of the fact that the conduct of the plaintiff which is made the ground of suspension involved his failure to answer concerning his membership in a professional union and in the Communist Party, the court will give you some specific instructions as to the bearing of the question on the problem before you.

“You are instructed that in California it is libelous to call a person a Communist. This for the reason that such a charge would expose a person to the hatred, contempt and ridicule of many persons.

“At the same time, I instruct you that in California it is lawful for a person to be a member of the Communist Party, and to register with the Registrar of Voters of a county as a member of such party. In California, the Communist Party is entitled to participate in elections, including primary elections, and to nominate candidates. And, while, under California law, any party which carries on or

advocates the overthrow of the government by unlawful means or which carries on or advocates a program of sabotage may not participate in primary elections, the courts of California have ruled that the courts do not take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force or violence, and they have also ruled that a registered Communist is not guilty of a violation of the State law by the mere fact of membership in the Communist Party. You are to bear these facts in mind in judging whether the conduct of the plaintiff was as charged by the defendant. And, in determining this matter, you are to bear in mind the following facts and additional instructions.

“I have stated that in California an accusation of Communism against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided, or which has a tendency to injure him in his occupations, is libelous *per se*.

“The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

“In this matter, the law recognizes that men’s reputations are ‘tender things,’ and presumes that every person has a good reputation.

“For this reason, the law does not require one who has been libelled to prove its falsity. On the contrary, falsity is presumed if the publication is unprivileged, that is, not uttered in a judicial or legislative proceeding or other proceedings protected by law, and is of a character to affect his reputation, such as a charge of Communism is.

“The person who libels another has the burden of proving that the charge is true. He who repeats a libelous statement, if he wishes to justify it, must prove not that another has made the statement, but that the statement is true.

“These principles should be borne in mind by you in considering the testimony in this case in which reference was made as to certain accusations made against the plaintiff in certain publications and before the Committee which were repeated and discussed in the presence of some of the defendant’s representatives. You were admonished at the time when these accusations were repeated here and I admonish you again now that they are to be considered only as having been made and that no one has proved in this lawsuit that these accusations are true. Indeed, the truth of these accusations is not an issue in the case. And the reason, as already stated, is that the defendant has not charged the plaintiff is a Communist or a member of the Communist Party and that the notice of suspension involved here does not set forth as a ground of suspension the fact, if it be a fact, that the plaintiff is or ever has been or was at the time of the notice, a Communist or a member of the Communist Party. As you have already been instructed, the defendant, having, in accordance with the contract of employment, specified in the notice the ground on which they relied for suspension, is bound by it. And the only ground of suspension set forth in the notice is the conduct of the plaintiff before the Un-American Activities Committee of the Congress in connection with certain hearings and at the time specified of his appearance before that Committee. All the evidence on the part of both the plaintiff and the defendant has been directed to that conduct. And the question whether the plaintiff is

or is not, was or was not, a Communist, is not before you. All you have to determine is whether in not answering in the manner requested by the Committee, the question, among others, whether he was a Communist or a member of a trade organization, and whether his entire conduct before the Committee in connection with the hearings was of the type forbidden by what has been called the 'public relations' clause as bringing the plaintiff into public scorn and contempt, shocking and offending the community and prejudicing the defendant and the industry.

"And, in determining this matter, you are to consider all the evidence and reach your verdict without trying to speculate about the political affiliations of any of the witnesses or parties in this case."

to which instruction the defendant objected on the following grounds [R. 953-4]:

"Subdivision VII of the charge, the question of Communism—we object generally to so much of the charge as does any more than tell the jury that it is a fact, which the court will judicially notice, that there is a noticeable segment of the population of this country who look with scorn, contempt, hatred and ridicule, upon the Communist Party and its sympathizers. Beyond that, any instructions as to the law of libel, the burden of proof in libel cases, the question of privilege and libel, the burden upon the alleged defamer or any other person to prove the truth of the charge, are all matters completely extraneous to any issue in this case.

* * * * *

"Mr. Selvin: We object to so much of that portion of the charge as discusses the legal position of the Communist Party in California, particularly in view of the exclusion of the evidence offered by the defendant to show that the Party does, in fact, ad-

vocate force and violence. And we object to the concluding portion of that subdivision of the charge which tells the jury that they should not speculate about the politics or political affiliations of any person involved on the ground that, in the manner given, it tends to eliminate from the consideration of the jury the question of what the effect upon the public was or tended to be in respect to their belief as to Mr. Cole's political affiliations." [Point I, A, B, *infra*, pp. 68-77.]

13. The trial court erred in refusing to give the following instruction requested by defendant [R. 101, 128-9]:

"Defendant's Requested Instruction No. 7:

"In addition to stipulated facts and facts which are the subject of direct or indirect evidence, certain facts are the subject of judicial notice. Such facts, that is, facts which are the subject of judicial notice, are conclusively deemed to be known by the Court and jury and are, therefore, deemed established in the case without any evidence of them. Among the facts judicially noticed is the fact that many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers."

to the refusal to give which defendant objected as follows [R. 922]:

"Mr. Selvin: Yes, we have. We will object to the refusal to give defendant's requested instruction No. 7." [Point I, F, *infra*, pp. 106-9.]

14. The trial court erred in submitting the following special verdict or question to the jury [R. 920, 961]:

“Question 4:

“Did the defendant Loew’s, Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him?

“(Answer ‘Yes’ or ‘No’.)

“Answer: . . .”

to which submission the defendant objected on the following grounds [R. 879-86, 933]:

“Mr. Selvin: Our position on that, your Honor, is that if waiver is properly an issue of fact in this case (if it is), and if there is a conflict in the evidence in that regard, then, it is, of course, a matter that should be submitted to the jury. However, we take the position that there is no issue of waiver in this case whatever. The pleadings raise the issue of performance, not waiver of performance. And the rule is well settled, I think, that in a contract action where waiver of performance, rather than performance, is relied on, that fact must be pleaded.

* * * * *

“Mr. Selvin: Well, as I say, our position is that the only issuable facts pleaded, whatever the form of the action, are (1) whether or not the plaintiff duly performed, and that anticipates our claim of non-performance by pleading that affirmatively; and (2) whether the statements in the statement are true or false. The questions to be presented to the jury, as they are formulated relate to that last question, because those are the issues as raised by the pleadings, but there has never been any issue of fact raised in this case with reference to waiver. The fact that facts come in relative to an issue unraised does not put the unpleaded issue into the case.”

* * *

Mr. Selvin: Now, since your Honor is rewriting a Special verdict, I might properly call attention to our objection to question 4 at this time, so that if there is anything in them that your Honor desires to adopt, it won't require a further rewriting.

"The Court: No. I am satisfied that that question should be submitted. I worded that very carefully. I wrote it and rewrote it several times and I think the question should be submitted to the jury because it is an issue which I have covered by instructions, the question of waiver, it was argued to the jury, and it should go in as an alternative condition and I have worded it in such a manner that it can be answered yes or no, regardless of how the first three questions are answered.

"Mr. Selvin: Well, we have indicated heretofore our objections.

"The Court: Yes, you have indicated your objections to the problem. I think this is properly before the jury." [Point I, C, 1, *infra*, pp. 78-9.]

15. The trial court erred in denying and refusing to grant defendant's application, made on the ground of personal bias and prejudice of the District Judge, to have the cause transferred to another judge. [Point III, *infra*, pp. 122-6.]

SUMMARY OF THE ARGUMENT.

The section headings and subheadings of our argument have been prepared with the idea that when collected into an index or table of contents they will serve as an outline or summary of the argument. Accordingly, and in the interests of space, we incorporate, but do not repeat the index appearing at the commencement of this brief as our summary of the argument.

ARGUMENT.

I.

THE TRIAL COURT'S CHARGE TO THE JURY WAS PREJUDICIALLY ERRONEOUS.²¹

The rule in California is well settled—so well settled that it has several times been referred to as “elementary” [*L. A. Gas etc. Co. v. Amal. Oil Co.*, 168 Cal. 140, 143, 142 Pac. 46, 47-8; *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 796, 256 Pac. 296, 197]—that a party himself in default cannot enforce a contract even though the other party has subsequently followed the first offender’s example and has also defaulted. [*Wood etc. Co. v. Seurich*, 5 Cal. App. 252, 253-5, 90 Pac. 51, 52; *Towney v. People’s Ice Co.*, 66 Cal. 233, 234, 5 Pac. 158, 159; *Dunn v. Daly*, 78 Cal. 640, 644-5, 21 Pac. 377, 378-9; *Ross v. Tabor*, 53 Cal. App. 605, 612, 200 Pac. 971, 974; *Kulawitz v. Pac. etc. Paper Co.*, 25 Cal. 2d 664, 669, 155 P. 2d 24, 27; *Karales v. L. A. Creamery Co.*, 36 Cal. App. 171, 172-3, 171 Pac. 821; *Calif. Sugar etc. Agency v. Penoyar*, 167 Cal. 274, 280-1, 139 Pac. 671, 674.]

Another statement of the same principle is, that before a plaintiff may recover in contract he must show

²¹In the following discussion of the errors claimed by us to inhere in the trial court’s charge to the jury, we do not repeat the objections to the charge which were made below. These are fully set out in the relevant Specification of Error, *supra*, pp. 45-67. No point is raised here which was not the subject of an appropriate objection in the District Court.

that he has performed all the conditions and agreements of the contract on his part to be performed; so that if he fails to make that showing or it appears affirmatively that he has not so performed, the judgment must go against him. [*L. A. Gas etc. Co. v. Amal. Oil Co.*, 156 Cal. 776, 778, 106 Pac. 55, 57; *Cameron v. Burnham*, 146 Cal. 580, 584, 80 Pac. 929, 930; *Bristol v. Hershey*, 7 Cal. App. 738, 744, 95 Pac. 1040, 1042; *Minaker v. Calif. Canneries Co.*, 138 Cal. 238, 241-2, 71 Pac. 110, 111-12.]

Had the jury returned an answer, favorable to defendant, to the fourth question relating to waiver and to any one of the first three questions relating to plaintiff's conduct, the only conclusion of law that could have been drawn, conformably to the doctrine illustrated by the decisions cited above, would have been that plaintiff, being first in default, could not enforce the employment contract against defendant. It becomes of prime importance, therefore, to ascertain whether these questions were answered by the jury under a submission which was free from error affecting defendant's contentions and theories of the case.

A. There Was No Issue of Libel in the Case. The Elaborate Charge on That Subject Was, Therefore, Irrelevant and Necessarily Misleading and Confusing. [Specification of Error, No. 12.]

First: Under the heading "The Question of Communism" the trial judge read to the jury a set of instructions which would have been appropriate only in an action for libel arising out of a false accusation of Communist Party membership. The jury was told that in California it is libelous to call a person a Communist, for the reason that to do so exposes him to the hatred, contempt and ridicule of many persons; that the law recognizes in every man a right to have the estimation in which he stands unaffected by false statements to his discredit; that the law recognizes that men's reputations are tender things and presumes that every person has a good reputation. Accordingly, the charge went on, the law does not require one who has been libelled to prove falsity; rather, falsity is presumed if the publication is unprivileged and the burden is on the person making or repeating the charge to prove its truth. The jury was told further, that the evidence that plaintiff had been called a Communist was proof only of the fact that such statements had been made and that "no one has proved in this lawsuit that these accusations are true."²² [R. 915-17.]

It is self-evident, we submit, that except for the statement that an accusation of Communist Party membership subjects the person accused to the hatred, contempt and ridicule of many persons, no part of the instruction

²²We think it appropriate to remark at this point that when defendant sought to question plaintiff as to whether he was a Communist, the trial court refused to permit the question to be answered. [See, Point II, D, *infra*, p. 118.]

summarized above had any place in the case at bar.²³ The action which was being tried below was, in substance, a breach of contract case, not a libel case. The basic issue was not whether plaintiff had been falsely accused of being a Communist, but whether he had so conducted himself as to tend to shock or offend the community or bring himself into public scorn or contempt or prejudice the interests of his employer or the motion picture industry. And this, in turn, depended, in substantial part at least, on whether, by his actions, he had led the public or a considerable segment thereof to believe either that he was a member of the Communist Party, or was one who sympathized with or approved of what the public believed that party's objectives and methods to be, or was a person who condemned and held in scorn basic American institutions and ideals.²⁴ Defendant's theory of the case in

²³It is a fact of which courts will take judicial notice that many right thinking persons look with scorn and contempt upon one who is a member of or in sympathy with the Communist Party. [See cases cited, Point I, F, *infra*, pp. 107-8.] As might be expected this specific application of the general rule that courts will notice judicially current popular beliefs and public attitudes and states of mind, is usually found in the libel decisions in support of the proposition that a false accusation of Communist membership or sympathy is libelous *per se*. But that fact does not import into another type of case, in which the question of public sentiment toward Communism may be in issue, all or any part of the substantive law of defamation.

²⁴It is obviously a fair inference from the fact of refusal to answer a question, when asked on an appropriate occasion, that the answer if given would have been adverse, even when the refusal is placed on constitutional grounds. [2 Wigmore on Evidence (3d. ed.), 162 *et seq.*, Secs. 285-90; *Fross v. Wotton*, 3 Cal. 2d 384, 393, 395, 44 P. 2d 350, 354-5; *Spath v. Seager*, 39 Cal. App. 2d 10, 14, 102 P. 2d 350, 352; *Nelson v. So. Pac. Co.*, 8 Cal. 2d 648, 654-5, 67 P. 2d 682, 685. Compare, *In re MacKay* (D. C., Ind.), 71 Fed. Supp. 397, 400-401.] Plaintiff's refusal to disclose whether he was a member of the Communist Party when that question was put to him by the Committee was plainly susceptible to the inference that he was a Communist. The trial court, however, would not allow defendant to prove that the overwhelming public reaction to plaintiff's conduct was precisely to that effect. [See, Point II, *infra*, pp. 113-15.]

this regard was never adequately or at all presented to the jury by the trial court. Instead, the jury's attention was diverted to a wholly extraneous matter—that of libel—which was not only confusing and misleading because extraneous but seriously prejudicial in substance.

From the earliest times it has been held that it is error to give an abstract instruction having no bearing upon the issues and thus to inject an irrelevant factor into the controversy. This because the necessary tendency of such a charge is to confuse and mislead. [*U. S. v. Breitling*, 61 U. S. 252, 254-5, 15 L. Ed. 900, 902; *Insurance Co. v. Baring*, 87 U. S. 159, 161-2, 22 L. Ed. 250, 251-2; *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), 245 Fed. 853, 854-5; *Beaver v. Taylor*, 68 U. S. 637, 644, 17 L. Ed. 601, 603.]²⁵

The patent tendency of this instruction to confuse and mislead in the instant case is revealed by a mere reading of the section of the charge presently under discussion. The stated presumption of good reputation [R. 916], especially when considered in the light of the trial court's refusal to permit any evidence of what the public really thought of plaintiff's conduct, could serve only to lead the jury to believe that he had not brought himself into public scorn or contempt and that he had not shocked or offended

²⁵Other cases supporting the proposition stated in the text are: *Quercia v. U. S.*, 289 U. S. 466, 470, 77 L. Ed. 1321, 1325, 53 S. Ct. 698, 699; *Denver Tramway Corp. v. Anderson* (C. C. A. 10), 54 F. 2d 214, 215; *Lachman v. Penn. Greyhound Lines* (C. C. A. 4), 160 F. 2d 496, 501; *McCarthy v. Penn. R. Co.* (C. C. A. 7), 156 F. 2d 877, 882, cert. den. 329 U. S. 812; *Northwestern Mut. L. Ins. Co. v. Stevens* (C. C. A. 8), 71 Fed. 258, 262-3. Applications of the same rule in upholding a refusal to charge are found in: *Howard v. Capital Tr. Co.* (App., D. C.), 163 F. 2d 910, 912, pointing out that “. . . Statements of irrelevant principles of law, however sound in the abstract, have no place in instructions to juries.”; *Salmon v. Helena Box* (C. C. A. 8), 158 Fed. 300, 304; *Panama R. Co. v. Davies* (C. C. A. 5), 82 F. 2d 123.

the community. Similarly, the statement that a libelous charge of Communism is presumed to be false and that the accuser has the burden of proving otherwise must necessarily have had the same misleading connotation.

And then, as if to leave no doubt of this negation of defendant's theory of the case, the jury was told that the charge of Communism against plaintiff *had not been proved*. [R. 917.] In the context in which that sentence appears in the charge, it could have been taken as nothing else but a direction that the defense was without support in the evidence.

Second: The prejudicial nature of these irrelevant instructions does not rest in doubt. They went to the very heart of the defense and completely stifled it. They affected the substantial rights of the defendant; and since it cannot be said that it affirmatively appears from the whole record that giving them was harmless, reversible error is fully made out. [*McCandless v. U. S.*, 298 U. S. 342, 347-8, 80 L. Ed. 1205, 1208-9, 56 S. Ct. 764; *Pacific Greyhound Lines v. Zane* (C. C. A. 9), 160 F. 2d 731, 737; *Lynch v. Ore. Lbr. Co.* (C. C. A. 9), 108 F. 2d 283, 285-7; *Ah Fook Chang v. U. S.* (C. C. A. 9), 91 F. 2d 805, 810.]²⁶

²⁶To the same general effect are: *Bihn v. U. S.*, 328 U. S. 633, 637-8, 90 L. Ed. 1484, 1487-9, 66 S. Ct. 1172, 1174-5; *Bruno v. U. S.*, 308 U. S. 287, 293-4, 84 L. Ed. 257, 260-1, 60 S. Ct. 198, 200-1; *Williams v. Great Southern L. Ins. Co.*, 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417, 419; *U. S. v. River Rouge Imp. Co.*, 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144, 147-8.

B. The Instruction That the Communist Party and Membership in It Did Not Violate Any Law of California Was One-Sided Because It Charged Upon an Issue Previously Ruled Immaterial and in Respect of Which Defendant's Evidence Was Excluded. It Was Also Incomplete and Misleading Since it Omitted Any Reference to Illegality Resulting From Advocacy of Force and Violence. [Specification of Error, No. 12]

Interspersed among the instructions on libel was a charge on the legal status of the Communist Party in California. [R. 915-17.] The gist of it was that it is lawful in California to be a member of that party; that the party is entitled to participate in elections, and while, under California law, any party which advocates the overthrow of the government by unlawful means may not participate in primary elections, judicial notice will not be taken of the fact that the Communist Party advocates force and violence; and a registered Communist is not guilty of a violation of California law by the mere fact of membership. [R. 915.] The significance of these propositions, the jury was told, was that they were to be borne "in mind in judging whether the conduct of the plaintiff was as charged by the defendant. . . ." [R. 915-16.]

There are several serious errors in this portion of the charge.

First: Assuming the instruction to have been in all respects correct as an abstract statement of law (which, as

we shall demonstrate in a moment, it was not) it was manifestly one-sided and unfair in the state of the record at the time it was given. The defendant, recognizing that in California judicial notice is not taken of the fact that the Communist Party advocates force and violence [*Communist Party v. Peek*, 20 Cal. 2d 536, 547, 127 P. 2d 889], had sought and offered to prove the fact of such advocacy and the further fact that the party is the agent of a foreign power. The trial court refused to receive the evidence, because he deemed it immaterial and irrelevant. [R. 829-40.]

Having put the record in that condition, was it not inconsistent to tell the jury, for all practical purposes as an unqualified fact, that the Communist Party did not advocate force and violence and, therefore was a lawful organization, membership in which was no crime? By the time this instruction was given the trial judge had apparently concluded that the legality of the party was a material factor to be considered in weighing plaintiff's conduct, since he told the jury exactly that. [R. 915-16.] If it was not material or relevant, as he originally thought, the charge should have been silent on that score. But if it was material, as the jury was instructed it was, then this change in the court's attitude should have been seasonably called to defendant's attention, an opportunity afforded to introduce the countervailing evidence, and *both* sides of the proposition of legality presented to the jury, not just the plaintiff's. [*Western Real Est. Trustees v. Hughes* (C. C. A.

8), 153 Fed. 560, 561; *U. S. v. Messinger* (C. C. A. 4), 68 F. 2d 234, 237, and cases there cited; *Harkinson v. Harkinson* (C. C. A. 8), 101 Fed. 71, 74; *Baer Bros. etc. Co. v. Palmer* (C. C. A. 10), 158 F. 2d 278, 280-1.]

Second: It is not necessarily or at all true that in California the Communist Party is a lawful organization or that membership in it is not a crime. If, as the defendant contended and sought to prove, the organization in fact advocates the overthrow of our present form of government by force, violence or other unlawful means, it and knowing membership in it are criminal. That is the perfectly plain import of the California Criminal Syndicalism Act and the decisions construing it. [*Cal. Stats.*, 1919, c. 188, p. 281; *Whitney v. California*, 274 U. S. 357, 368-72, 71 L. Ed. 1095, 1102-4, 47 S. Ct. 641, 645-7; *People v. McClenneen*, 195 Cal. 445, 452, 234 Pac. 91, 94; *People v. Taylor*, 187 Cal. 378, 385-90, 203 Pac. 85, 87-90; *People v. Steelik*, 187 Cal. 361, 369-70, 203 Pac. 78, 81. See, *Danskin v. San Diego etc. District*, 28 Cal. 2d 536, 544-5, 171 P. 2d 885, 890-1. See, also, *Branch v. Cahill* (C. C. A. 9), 88 F. 2d 545, 546.]²⁷

²⁷The text of the act, so far as pertinent here, is printed in the appendix to this brief. The cases cited are typical. Many more to the same effect could be added but those referred to sufficiently make out the proposition in question.

To be sure, the evidence which would have made out the criminal character of party membership was not before the jury. But defendant cannot be charged with responsibility for its absence. It necessarily follows, therefore, that the incomplete and defective statement of the law in respect of the issue upon which that proposed evidence bore, should not have been made.

Third: When the trial court informed the jury that a party, which advocates the overthrow of government by unlawful means or which advocates a program of sabotage, may not participate in a primary election [R. 915] the implication must have been plain that this was the only consequence of such advocacy. Yet, as has been shown, far more drastic results may eventuate in the form of a prosecution of its members for and their conviction of a felony.

Laying entirely aside any question of whether the trial court should have admitted defendant's proffered evidence of advocacy of force and violence, it seems to us that there can be no adequate answer to our contention that, if the jury was to be told anything about the legal incidents of such advocacy, it should have been told the whole story, not just a relatively minor part thereof. What the trial court did, however, was to present to the jury plaintiff's theory of the issue while withholding the theory relied upon by defendant. [See cases cited, Point I, C, 6, *infra*, pp. 93-4.]

C. The Instructions Relating to Waiver Submitted to the Jury a Matter Not in Issue, Were Based on Partial Assumptions of Fact and Incorrectly and Incompletely Defined the Law. [Specification of Error, Nos. 10, 14.]

1. The Issue Was Not Pleaded nor Included in the Pre-Trial Order Settling the Issues.

We have already noted that no issue of waiver was raised by the pleadings and that when the issues of fact were settled by the pre-trial order, no suggestion of the existence of such a question was made or included in the order. [Statement of the Case, A, 3, *supra*, pp. 8-9.] That order, by the very terms of the rule authorizing it, was required to be controlling “of the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . .” [F. R. C. P., rule 16.]

The decisions giving effect to this rule are clear to the point that issues of fact not included within the scope of an order settling the issues should not be gone into at the trial. [*Fowler v. Crown-Zellerbach Corp.* (C. C. A. 9), 163 F. 2d 773, 774; *McCarthy v. Lerner Stores Corp.* (D. C., D. Col.), 12 F. R. S. 16.33, Case 1; *Bryant v. Phoenix Bridge Co.* (D. C., Me.), 43 Fed. Supp. 162, 164; *Berry v. Spokane etc. Ry. Co.* (D. C., Ore.), 2 F. R. D. 483-84. Compare, *Franchon & Marco, Inc. v. Hagenbeck etc. Co.* (C. C. A. 9), 125 F. 2d 101, 104; *McDonald v. Bowles* (C. C. A. 9), 152 F. 2d 741, 742-3; *Berger v. Brannan* (C. C. A. 10), 172 F. 2d 241, 243; *Ringling Bros. etc. Shows v. Olvera* (C. C. A. 9), 119 F. 2d 584,

586. And generally, see, *Holtzoff*, Pre-Trial Procedure, 1 F. R. D. 759, 763; Report of Committee on Pre-Trial Procedure to the Judicial Conference for the District of Columbia, 4 F. R. S. 1015, L. R. 47.]

Since, therefore, the effect of an unmodified order settling the issues is conclusively to exclude all other questions from consideration, the submission of such an excluded issue to the jury is certainly the equivalent of submitting to them a matter not raised by the pleadings.²⁸ And in the latter situation the rule is clearly and firmly established that it is prejudicial error to give to the jury an issue outside the pleadings. In fact this rule has been said to be "too well-settled to require the citation of authorities. . . ." [*Union Pac. R. Co. v. Garner* (C. C. A. 8), 24 F. 2d 53, 54-5. And to the same general effect are the following among many others: *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), *supra*, 245 Fed. at 855; *Sacramento Suburban etc. Co. v. La Gue* (C. C. A. 9), 40 F. 2d 897, 899; *Kennedy Lbr. Co. v. Rickborn* (C. C. A. 4), 40 F. 2d 228, 230-1; *Gerber v. Borderland Coal Sales Co.* (C. C. A. 6), 5 F. 2d 278, 279; *Shell Pet. Corp. v. Scully* (C. C. A. 5), 71 F. 2d 772, 774.]

²⁸Had there been no pre-trial order it might have been possible to argue that in a declaratory relief action the pleadings do not necessarily confine the case to the precise issues raised, when such enlargement of the dispute is necessary to settle the entire controversy in respect of which a declaration is sought. [See, *Borchard*, *Declaratory Judgments* (1934 ed.), p. 102.] But nothing in Rule 16 exempts a declaratory relief case from the conclusive effect of an order made pursuant to that rule.

2. **Giving the Conclusive Effect of Waiver to the Mere Circumstance of Retention of the Employee for a Short Time After His Breach of Contract Was Erroneous, Since the Question of Waiver Was One of Fact; the Employer Having, in Law, a Reasonable Time After the Employee's Breach Within Which to Act.**

If we assume that it was proper for the trial court to submit the question of waiver, it goes without saying that the submission should have been accompanied by a correct exposition of the applicable law. This was not done.

First: In the concluding paragraph of the charge on that subject the trial court peremptorily told the jury that if defendant, knowing of plaintiff's conduct before the committee, "put him back to work, and accepted his services with the intention of accepting Cole as its employee" then the plaintiff "waived the right to rely upon such conduct in taking action against Cole." [R. 910.] The same instruction was repeated, with a few immaterial verbal changes but none in meaning, after defendant's objections had been registered. [R. 957-9.] The repetition intensified the not merely damaging, but devastating effect on defendant's case. Since there was no dispute in the evidence over the facts assumed in this instruction, it amounted to a direction to return a verdict for the plaintiff.

But the law does not attach to conduct of the sort described in this direction the inflexible consequences posited by the lower court. Retention of an employee, who has given grounds for termination or acceptance of his services and payment of salary for a short time, do not necessarily or as a matter of law amount to waiver, even when done with knowledge by the employer of the employee's mis-

conduct. In such a case, the employer has a reasonable time after discovery of the employee's dereliction within which to determine what action should be taken. But it still remains a question of fact whether, under all the circumstances, including the retention of the employee during the period pending decision, there has been a waiver or condonation of the employee's breach of duty.²⁹ [*Moynahan v. Interstate etc. Co.*, 31 Wash. 417, 423-6, 72 Pac. 81, 83; *Rosbach v. Sackett Etc. Co.*, 134 App. Div. 130, 133-4, 118 N. Y. S. 846, 849; *Atlantic Compress Co. v. Young*, 118 Ga. 868, 871-2, 45 S. E. 677, 678-9; *In re Nagel* (C. C. A. 2), 278 Fed. 105, 110; *Jones v. Vestry* (C. C., N. Car.), 19 Fed. 59, 62; *Leatherberry v. Odell Etc. Co.* (C. C. N. Car.), 7 Fed. 641, 648; *Batchelder v. Standard Plunger Elev. Co.*, *supra*, 227 Pa. at 207, 75 Atl. at 1092.]

Second: There was ample evidence from which the conclusion of no-waiver could have been drawn. First of all, is the fact that only one month intervened between the time of plaintiff's appearance before the Committee and the suspension. [R. 471-3.] Since the gravamen of the claim of breach of contract was the public effect of plaintiff's conduct, some time necessarily had to elapse before that effect could have been ascertained and weighed. One

²⁹The rule just stated is, of course, a particularized application of the general principle that condonation or waiver is ordinarily a question of fact [*Lyons v. Brunswick etc. Co.*, 20 Cal. 2d 579, 583, 127 P. 2d 924, 927; *Boyd v. A. E. J. Chivers Co.*, 134 Cal. App. 566, 569, 25 P. 2d 878, 879; *Lackman v. Simpson*, 46 Mont. 518, 525, 129 Pac. 325, 327; *Batchelder v. Standard Plunger Co.*, 227 Pa. 201, 207, 75 Atl. 1090, 1092] and of the further proposition that what is a reasonable time depends upon the circumstances of the case and is also a question of fact. [*Hoppin v. Munsey*, 185 Cal. 678, 684, 198 Pac. 398, 400; *Henningsen v. Anderson*, 212 Cal. 336, 341, 298 Pac. 999, 1001; *Los Angeles etc. Co. v. Wilshire*, 135 Cal. 654, 657, 67 Pac. 1086, 1088.]

month cannot be said, *as a matter of law*, to have been an unreasonable time in that regard, particularly when it is remembered that defendant had to be concerned, not with the public reaction in one or two towns, but with the entire nation. [Cases cited, note 29, *supra*, p. 81.]

Furthermore, there is the significant fact that, immediately after the Committee hearing, plaintiff was told by defendant, in substance, that his situation was doubtful; that defendant's studio head, Mr. Mayer, was very much concerned about the effect of the hearings upon plaintiff and did not approve of the course he had taken; and that the company's public relations director was seeking some statement from plaintiff which could be used to overcome the resulting bad press. [*Statement of the Case*, B, 4 d, *supra*, pp. 27-31.] That statement was not forthcoming until just two or three days before the suspension. By that time defendant had determined to suspend plaintiff unless he complied with certain conditions, one of which was a sworn declaration that he was not a Communist. [*Statement of the Case*, B, 3, *supra*, pp. 21-2.] The affidavit supplied by plaintiff did not contain such a declaration. Instead, it studiously avoided the matter and in addition, contained in briefer compass than before a repetition of plaintiff's previous epithetical and sarcastic castigation of the Congressional Committee, its motives and its good faith. [R. 688-9.] It reaffirmed plaintiff's actual as distinguished from his criminal contempt of Congress and in effect advised defendant that defendant could expect from plaintiff no cooperation in dispelling the adverse public reaction. In other words, it was in such form that had it been publicized, instead of quieting this adverse public reaction to plaintiff's conduct, it would have

aggravated it, and thereby would have defeated the very purpose for which the affidavit was requested by defendant.

Certainly, this evidence would have supported a finding that defendant exercised its rights within a reasonable time. Under the charge as given, however, the jury had no discretion to make such a finding, for they were told that the mere fact that defendant, with knowledge of his conduct, accepted plaintiff's services with the intention of accepting him as its employee, required them to find that the defendant's rights had been waived.

3. The Element of Intentional Relinquishment of a Known Right Was Omitted From the Definition of Waiver, and If Contained Was in Conflict With Other Peremptory Portions of the Charge.

The law of California is clear to the effect that waiver is the *intentional* relinquishment of a known right [*Roesch v. De Mota*, 24 Cal. 2d 563, 569, 150 P. 2d 422, 426; *Alden v. Mayfield*, 164 Cal. 6, 11, 127 Pac. 45, 48; *Wienke v. Smith*, 179 Cal. 220, 226, 176 Pac. 42, 44; *Cohen v. Metropolitan L. Ins. Co.*, 32 Cal. App. 2d 337, 348-50, 89 P. 2d 732, 739; *McDaniels v. General Ins. Co.*, 1 Cal. App. 2d 454, 460, 36 P. 2d 829, 832. Generally, see 25 Cal. Jur. 926, secs. 2, 3.] This element of intentional relinquishment was never clearly explained or put to the jury in the instant case, and that omission taints the entire charge on the subject of waiver.

Of course, waiver may be implied or inferred from conduct susceptible of the inference that a known right is being intentionally relinquished. But whether or not such an inference should be drawn is for the jury to determine under instructions properly delineating the various elements which go to make up a waiver. [Cases cited, note 29, *supra*, p. 81.] Here, however, the trial court did

not leave the issue to the jury as one of fact. Instead, it directed the jury's notice to certain evidence of defendant's conduct and then told them, in necessary effect, that this conduct amounted to waiver as a matter of law. [R. 908-10.]

True enough, the charge did contain one sentence to the effect that a "waiver is such conduct of the employer as shows his election to forego the right to suspend, which he might otherwise have taken or insisted under the contract." [R. 910.] But this one sentence in the midst of over ten paragraphs of instructions of contrary import cannot be said to have cured the error. At best it served only to make the charge on this subject confusing and contradictory. This is especially so when we remember that in the concluding paragraph of that section of the charge the jury was told peremptorily that retention of plaintiff as an employee effected a waiver as a matter of law. [Point I, C, 2, *supra*, pp. 80-83.]

A conflict of this sort in a charge to a jury is, of course, reversible error in and of itself. [*Baer Bros. etc. Co. v. Palmer, supra*, 158 F. 2d at 280-81; *Durant Min. Co. v. Percy Consol. Min. Co.* (C. C. A. 8), 93 Fed. 166, 168-9; *Mideastern Contracting Corp. v. O'Toole* (C. C. A. 2), 55 F. 2d 909, 910-11; *J. H. Sullivan Co. v. Wingerath* (C. C. A. 2), 203 Fed. 460, 461-2. Compare: *Puget Sound Nav. Co. v. Nelson* (C. C. A. 9), 59 F. 2d 697, 700; *Louisville & N. R. Co. v. Johnson* (C. C. A. 7), 81 Fed. 679, 681; *Chicago etc. R. Co. v. Kelly* (C. C. A. 8), 74 F. 2d 80, 84-5.]

4. While the Verdict to Be Rendered on the Question of Waiver Was Properly Limited to Matters Occurring Subsequent to the Alleged Breach, the Charge Permitted and Invited the Jury to Consider in That Regard the Evidence of Prior Happenings.

First: As has been previously noted, the question given the jury on the subject of waiver was limited, and properly so, to acts of the defendant occurring subsequent to the alleged breach of contract, *i. e.*, subsequent to the Committee hearing.³⁰ [R. 163.] But in the charge on this matter the jury was permitted to consider and their attention was specifically directed to the evidence of defendant's statements and conduct *prior* to that time. [R. 907-10.] The jury was thus permitted, in fact invited, to take into account in arriving at their answer to the question of waiver, evidence which was irrelevant to the interrogatory submitted. That too, was error, for the same reason that any instruction not applicable to the issue to be decided is error—its necessary tendency being to confuse and mislead, and, what is worse, to permit decision on the basis of facts which in law are without probative force in support of the issue. [Cases cited, Point I, A, *First, supra*, p. 72.]

It is no answer to this criticism of the charge to say, as was said below, that the references to prior conduct were in relation to inducement of action by plaintiff and not to waiver. [R. 945.] The fact is that the instruction under discussion was contained in the section of the charge headed "The Acts of the Employer Considered as

³⁰That limitation of the scope of the question was brought about by defendant's objection to the original form of the verdict, which was unlimited as to time. [R. 933, 941-2.] But when the same objection was urged to the charge on that subject, it was overruled. [R. 945-6.]

Waiver” which heading was *read to the jury* [R. 907]; and was closely followed by the specific instructions heretofore referred to in which the word “waiver” appeared several times, and which were admittedly intended to apply to that issue. In these circumstances the jury must have understood the instruction as governing their deliberations in respect of their answer to the waiver interrogatory.

On the other hand, no interrogatory or special verdict was given the jury in respect of plaintiff’s conduct having been induced by defendant’s prior acts. If the charge did not relate to the matter of waiver, there was no occasion to give it at all; and it was, therefore, prejudicially erroneous for that reason. [Cases cited, Point I, A, *First, supra*, p. 72.]

Second: If defendant’s acts and statements prior to plaintiff’s commission of the alleged breach of contract had any bearing at all on the question of the former’s right to take advantage of the breach when it occurred, it could only have been on some theory of amendment of the contract or estoppel. A waiver *in futuro* of a right yet to arise under a written contract, as distinguished from a present waiver of an existing and perfected right, or from an estoppel, cannot be recognized in California. The reason for non-recognition is that to enforce such a future or prospective waiver would be in effect to write out of the contract the provisions claimed to have been waived; and in California a written contract may be amended only “by a contract in writing, or by an executed oral agreement, *and not otherwise.*” [Cal. Civil Code, Sec. 1698 (*italics ours*); *Harloe v. Lambie*, 132 Cal. 133, 136, 64 Pac. 88, 89; *Twohey v. Realty Syndicate Co.*, 4 Cal. 2d 379, 383, 49 P. 2d 819, 820-21; *Urban v. Yoakum*, 89 Cal. App. 202, 208, 264 Pac. 493, 495; *Gladding etc.*

Co. v. Montgomery, 20 Cal. App. 276, 279, 128 Pac. 790, 791.] Conduct of one party to a contract which, it is claimed, has modified the rights or liabilities of the other party under the agreement and which does not amount to an amendatory agreement, can be given prospective operation only when it is such as amounts to an estoppel.

So far as estoppel is concerned, no issue in that regard was pleaded or raised.³¹ Furthermore, the jury was not instructed as to the elements necessary to make out an estoppel against taking advantage of plaintiff's breach. They were not told, as a proper charge on that subject would have required, that to constitute an estoppel there must be (1) knowledge of the facts on the part of the person claimed to be estopped; (2) an intention by that person that the allegedly estopping conduct be acted upon, or such action taken by him as *reasonably justifies* the other person in believing that action by the latter was intended to be induced in reliance on the former's conduct; (3) ignorance of the true facts on the other party's side; and, (4) prejudicial reliance. [*Lux v. Haggin*, 69 Cal. 255, 266, 10 Pac. 674, 675-6; *Bank of America v. Pac. Ready-Cut Homes*, 122 Cal. App. 554, 561, 10 P. 2d 478, 481, and cases there cited. For a complete citation to the California decisions, see, 10 Cal. Jur. 626 *et seq.*, Secs. 14-21.]

In the light of these principles, and since only the question of waiver was given the jury, it was proper, as was done in the form of verdict, to limit that question to conduct occurring after the time of the alleged breach; but by the same token, it was prejudicially erroneous to nullify

³¹The trial judge was of the opinion that estoppel was not involved and that he was *not* instructing on the law in that regard. [R. 946.]

that limitation by permitting the question to be answered on the basis of what took place prior to that time.

5. The Charge That Plaintiff Was Entitled to Act as He Did Before the Committee Because of His Subjective Belief as to Defendant's Attitude Erroneously Excluded From the Jury's Consideration the Question of Whether There Were Reasonable Grounds for the Belief and Improperly Assumed That Defendant Knew What Plaintiff's Conduct Was Going to Be.

As part of the charge on waiver, the jury was told that if plaintiff was led to believe by the defendant that the latter was not concerned about whether he was a Communist and did not inform him of any change in that attitude or instruct him as to how to conduct himself before the Committee in advance of his appearance, then plaintiff had "the right to pursue the conduct he had decided upon on the basis of the prior acts and statements [of defendant] . . . without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist."³² [R. 908-9.] This instruction is erroneous for reasons in addition to those already discussed.

First: The question as to whether plaintiff, under all the facts, had the *justifiable right* to believe that he could

³²The reasoning implicit in this instruction involves an obvious *non-sequitur*. There is a great and readily discernable difference between defendant's lack of concern over plaintiff's *private* political affiliations and its very great concern over his conduct, and the effect of that conduct on the public, when those affiliations were being properly and publicly inquired into by the legislative branch of the federal government. It does not necessarily follow that because defendant was unconcerned about the one it would also be indifferent to the other.

do as he saw fit before the Committee, was not covered in the charge as given. It was enough, so far as anything the jury was told, that plaintiff should have been led to that belief, no matter how unreasonable or unjustifiable his conclusion may have been in the premises.

As we have shown, defendant's prior acts could not bar its right to assert a subsequent breach of contract except by way of estoppel or modifying agreement. And when it is estoppel that is to be dealt with, it is not sufficient that one person has been led to change his position in reliance on the other's statements; the statements must have been such and made under such circumstances as reasonably to have justified the belief that they were intended to be acted on. [*Parker v. Funk*, 185 Cal. 347, 352-3, 197 Pac. 83, 85-6; *Amer. Nat. Bank v. Somerville*, 191 Cal. 364, 372-4, 216 Pac. 376, 379-80; *Griffith v. Brown*, 76 Cal. 260, 262, 18 Pac. 372, 373. Cases cited, Point I, C, 4, *Second, supra*, p. 87.] Whether or not such intent was present in the case at bar was, obviously, a question of fact which the jury should have been allowed to consider in determining if defendant had "waived" its right to claim a breach of contract. [*Parke v. Franciscus*, 194 Cal. 284, 228 Pac. 435, 441; *Di Nola v. Allison*, 143 Cal. 106, 115, 76 Pac. 976, 979; *Bashore v. Parker*, 146 Cal. 525, 530, 80 Pac. 707, 709.]

The omission of this important consideration from the charge was particularly harmful, since it had the effect of eliminating from the jury's consideration the clear and positive evidence that before plaintiff took the stand in

Washington he had heard statements by Mr. Mayer and Mr. Johnston indicating quite plainly that any involvement with Communism would jeopardize his employment. [*Statement of the Case*, B, 5, *supra*, pp. 31-2.] That evidence would have supported a finding that on October 30, 1947, the day plaintiff testified, he was not justified in believing that "the course of conduct he had decided upon . . ." would not have any effect on his employment.

Furthermore, this particular instruction, it will be recalled, ended with the peremptory direction that if plaintiff had been led to the indicated belief, "he had the right to pursue the course of conduct he had decided upon . . ." without regard to any claim of breach of duty. [R. 908-9.] In other words, having that belief, his conduct was not a breach of contract. But a finding that he was not justified in holding such a belief—a finding the jury was not given the opportunity to make—would have required a different conclusion of law.

The instruction, therefore, falls squarely within the doctrine that exclusion from the jury's consideration of a material element that needed to be considered in determining whether a particular defense had been established is prejudicial error. [*Fillippon v. Albion Vein etc. Co.*, 250 U. S. 76, 82, 63 L. Ed. 853, 856, 39 S. Ct. 435, 437; *N. Y. Life Ins. Co. v. Rees* (C. C. A. 6), 19 F. 2d 781, 788-9; *Durant Min. Co. v. Percy Consol. Min. Co.*, *supra*, 93 Fed. at 168-9.]

Second: In this same connection the trial court told the jury that if defendant knew that plaintiff had been subpoenaed to appear before the Committee and desired that plaintiff there conduct "himself . . . in a certain manner, the defendant Loew's had a right to give reason-

able and specific instructions to Lester Cole and . . . it was his duty to follow them, if they were reasonable.”³³ [R. 909-10.] Having regard to the context in which this direction was given and its connection, by express reference, to that portion of the charge in which the jury was told that plaintiff had the right to refuse to answer the question as to whether he was a Communist [R. 908-9], the only significance it could have had to the jury was that defendant’s failure to instruct plaintiff how he should conduct himself left him free to act as he desired without contractual responsibility to defendant even though his conduct contravened the public relations clause. This faulty aspect of the charge is emphasized by the fact that plaintiff testified below that he had been given no instructions as to how he should or should not conduct himself before the Committee. [R. 696.]

Assuming for the moment, however, that defendant had the right to instruct plaintiff, it does not follow at all that it had an obligation so to do or that its failure to do so amounted to a waiver of plaintiff’s contract obligations or an authorization to plaintiff to breach his contract. In the charge, this “duty” of defendant to give plaintiff instructions as to his conduct before the Committee, was made to depend on and arise from the mere fact that defendant knew that plaintiff had been subpoenaed. [R. 909.] The implication thus is that defendant should have anticipated, because of that far from unusual circum-

³³The jury was not given any criterion of reasonableness. They were thus without the materials with which to decide, for example, whether it would have been reasonable to instruct plaintiff to answer the question as to whether he was a member of the Communist Party, when plaintiff was strenuously insisting that the question was impertinent to the investigation, an invasion of his constitutional rights, and beyond the power of the Committee to ask. We doubt very much that plaintiff will concede that any such instruction by defendant would have been one which he was bound to obey.

stance, that in the absence of instruction, plaintiff would contemn and revile the Congress of the United States, defy its authority and violate the Federal statutes dealing with conduct of witnesses before committees of Congress.

Actually, however, defendant had every right to presume that the law would be obeyed and that accordingly plaintiff would behave with proper decorum and respect and that he would answer all pertinent questions put to him by the Committee.³⁴ Especially was defendant entitled so to assume in view of plaintiff's completely unforced denial of Communist affiliations made to Mr. Mayer some time before the hearing; and of the plain and uncontradicted evidence here that plaintiff at no time informed defendant of his purpose to conduct himself in the manner in which he did or of his design not to answer any questions relating to Communist Party membership. [R. 349, 309-10, 351, 420-1, 499, 743-4.]

Furthermore, plaintiff was already bound, by his contract, not to do anything which would tend to bring him into public scorn or contempt, shock or offend the community, or prejudice the interests of his employer. That obligation was not modified or annulled simply because

³⁴There can be no serious doubt of the pertinency of the questions put to plaintiff by the Committee. [*Lawson v. U. S.* (App. D. C.), F. 2d, decided June 13, 1949; *Morford v. U. S.* (App. D. C.), F. 2d, decided June 13, 1949; *Barsky v. U. S.* (App. D. C.), 167 F. 2d 241, 246, 250, *cert. den.* 334 U. S. 843, *applic. for rehear.* pending; *U. S. v. Josephson* (C. C. A. 2), 165 F. 2d 82, 88-9, *cert. den.* 333 U. S. 838, *rehear. den.* 333 U. S. 858.]

the defendant may not have seen fit from time to time to remind plaintiff that he had so agreed. The parties must be deemed to have known what they agreed to; and there is certainly no evidence that plaintiff did not know. The conclusion is implicit in the court's charge, however, that an integral provision of a contract is in some way dropped out of the agreement simply because the promisee did not tell the promisor, at a time when no default had yet occurred, that performance would be expected in accordance with its terms. That conclusion, we respectfully submit, is obviously an erroneous proposition of law.

6. The Charge Gave Undue Prominence to the Theory and Evidence of Plaintiff on Waiver, at the Same Time Minimizing and Omitting to Mention Defendant's Opposing Theory and Evidence.

It was, of course, the duty of the trial court not to direct the jury's attention solely to the theory and evidence favoring one side of the controversy while ignoring or giving relatively less attention to the opposing theory and testimony. It was similarly the court's duty not to single out for especial mention one circumstance or set of circumstances which did not comprise all of the relevant evidence on the point. [*Allison v. U. S.*, 160 U. S. 203, 212, 40 L. Ed. 395, 399, 16 S. Ct. 252; *Sperber v. Conn. Mut. L. Ins. Co.* (C. C. A. 8), 140 F. 2d 2, 5, *cert. den.* 321 U. S. 798; *Palmer v. Miller* (C. C. A. 8), 145 F. 2d 926, 931; *Weiss v. Bethlehem Iron Co.* (C. C. A. 3), 88 Fed. 23, 30, *cert. den.* 176 U. S. 685.

See, also, the cases cited, Point I, B, *First, supra*, pp. 75-6.]

Just such error is to be found in the charge on waiver in the instant case. In that charge the plaintiff's theory that he was immune from any responsibility to defendant for his conduct because he had been led to believe that defendant was not concerned about charges that he was a Communist, was fully stated, with direct references to the testimony in that connection. [R. 907-9.] But there is not one word in the instructions about the opposing theory of defendant, or about the evidence supporting that theory, that by the time plaintiff was sworn to testify in Washington he had compelling reason to believe that his employer might be very much concerned indeed, if the charges that he was a Communist found support in what took place in the hearings. [*Statement of the Case*, B, 5, *supra*, pp. 31-2; Point I, C, 5 *First, supra*, pp. 88-90.] The cases cited above demonstrate the error in this handling of the matter in the case at bar.³⁵

³⁵We have already pointed out that prior to the trial the defendant filed an application, on the ground of personal bias and prejudice of the judge to whom the case was assigned, to have it transferred to another District Judge; and that this application was denied. [*Statement of the Case*, D, *supra*, p. 38.] In such a situation, it has been said "that where the sufficiency of the affidavit is at least debatable . . . the reviewing court will consider whether actually in the trial of the case any prejudice was manifested toward the affiant by erroneous rulings or by the manner and demeanor of the judge towards the affiant . . ." [*U. S. v. Buck* (D. C. Mo.), 23 Fed. Supp. 503, 506.] In addition to the errors discussed in this brief, we invite consideration, in this connection, of the matters appearing in the Record, pp. 228-9, 233-41, 246-8, 292-3, 492-3, and 725-7, as indicative of the trial court's general attitude.

D. The Extensive Charge on the Rights of Witnesses Before Congressional Committees Was Irrelevant to the Issues of Fact Submitted to the Jury; It Left It to the Jury to Determine as a Matter of Law Whether Plaintiff's Conduct Was Lawful (and, at Best by Implication, Within Plaintiff's Contract Rights); and It Omitted Important Elements of the Law in That Regard. [Specification Error, No. 11.]

The trial court instructed the jury quite fully on "The Rights of Witnesses Before Committees" dealing, in that connection, with the right to make non-responsive answers, to invoke the Constitution, to precipitate a test of pertinency by declining to answer questions, the elements required to make out a contempt and similar matters bearing on whether plaintiff was in contempt on account of his conduct. [R. 911-13.] This portion of the charge was, like the others we have discussed, prejudicially erroneous.

1. The Issue to Be Decided by the Jury Was Whether Plaintiff's Conduct Had Tended to Bring Him Into Public Disrepute, Not Whether He Was Technically Guilty of a Contempt of Congress.

First: A reading of the charge will demonstrate, we believe, its irrelevance. Had the case been the trial of the indictment against plaintiff for his alleged contumacious conduct, this section of the instructions might have had some bearing. But the question which was involved below was not the one raised by that indictment, but simply whether plaintiff's conduct had the tendency to bring about the public consequences interdicted by the employment contract. That tendency, in view of the nature of plaintiff's conduct and the well known attitude of the great majority of the American public toward Com-

munism, was inherent in his conduct quite independently of his technical guilt or innocence of the charge of contempt.

Necessarily, therefore, this instruction tended to divert the jury from the real issue in the case and permitted them to frame their answers to the interrogatories upon a false and irrelevant basis. The decisions previously cited as to the erroneous nature of such instructions, *supra*, p. 72, are applicable here.

Second: One portion of this instruction was also irrelevant, even if it be assumed that some charge on the rights of Committee witnesses was proper. The concluding paragraph was a statement that "even the alien in our midst . . . has certain rights and privileges which he may assert and which it is the duty of a legislative committee to respect and of the courts to protect." [R. 913.] There is no alien involved in the instant case. The statement, therefore, is without any relevancy whatever. It is argumentative in form and effect. Its import, it seems to us, can only be an intimation that plaintiff, as a native-born citizen [R. 79], was entitled to even more protection than an alien and that in some unspecified way he had failed to receive this at the hands of the Committee.

2. The Charge as a Whole Left It to the Jury to Decide as a Matter of Law Whether Plaintiff's Conduct Was Lawful or Contemptuous.

First: Whether plaintiff's conduct before the Committee was lawful, as distinguished from its tendency to bring plaintiff into public disrepute, was not properly an issue in this case. But if it was a matter to be decided, it was certainly a question of law, not one of fact. The evidence of what plaintiff said and did while a witness

at the Committee hearing was uncontradicted. So, this not being a trial of the indictment involving that conduct, it was for the court, not the jury, to decide the legal effect of the evidence in this regard. [*Sinclair v. U. S.*, 279 U. S. 263, 298-9, 73 L. Ed. 692, 700, 49 S. Ct. 268, 273-4; *Owens v. Dancy* (C. C. A. 10), 36 F. 2d 882, 885, *cert. den.* 281 U. S. 746; *Dunegan v. Appalachian Power Co.* (C. C. A. 4), 23 F. 2d 395, 398; *Wright v. Farm Journal* (C. C. A. 2), 158 F. 2d 976, 978; *Brown v. Oregon King Min. Co.* (C. C., Ore.), 110 Fed. 728-9.]

Had such a determination been made, the jury would then have been told that plaintiff's conduct was unlawful. There can be no doubt that a Congressional Committee has the power to ask and compel answers to pertinent questions. [2 U. S. C. A. Sec. 192; *In re Chapman*, 166 U. S. 661, 668, 671, 41 L. Ed. 1154, 17 S. Ct. 677, 680-1; *Townsend v. U. S.* (App. D. C.), 95 F. 2d 352, 354-5, *cert. den.* 303 U. S. 664; *Sinclair v. U. S.*, *supra*, 279 U. S. at 294-6, 73 L. Ed. at 698-9, 49 S. Ct. at 272-3; *U. S. v. Bryan* (D. C., D. Col.), 72 Fed. Supp. 58, 63, *aff'd. sub. nom. Barsky v. U. S.*, note 34, *supra*, p. 92; *Fields v. U. S.* (App. D. C.), 164 F. 2d 97, 99-100, *cert. den.* 332 U. S. 851.] The authority to investigate the subject of Communism is plainly granted by the *Legislative Reorganization Act of 1946*, *supra*, page 10, and has been affirmed in the cases cited in note 34, *supra*, page 92. The validity of that grant of power has been upheld against attack on Constitutional grounds. [*Dennis v. U. S.* (App. D. C.), 171 F. 2d 986, 987-8, *pet. for cert. pending.* Also, cases cited, note 34, *supra*, p. 92.] And when the subject of a particular investigation is the infiltration of Communists into an industry of public information and instruction, it is certainly a pertinent

question to ask of one who prepares the material publicly disseminated by that industry whether he is or ever has been a member of the Communist Party. [*Barsky v. U. S.*, *supra*, 167 F. 2d at 250. *Josephson v. U. S.*, *supra*, 165 F. 2d at 88. See, also, *U. S. v. Lawson* (unreported), U. S. D. C., Dist. of Col., Crim. case No. 1352-47, and *U. S. v. Trumbo* (unreported), U. S. D. C., Dist. of Col., Crim. case No. 1353-47, *aff'd* (App. D. C.), F. 2d, decided June 13, 1949.]³⁶

Plaintiff's refusal to answer that question was, therefore, obviously a violation of the law.

Second: True enough, the jury was given an abstract statement of two elements required to be shown to uphold a charge of contempt, the purport of which was then summarized in the statement that a witness may properly refuse to answer where the bounds of the power are exceeded or the questions are not pertinent.³⁷ [R. 912-13.] It may be doubted, however, that this exposition had the same impact on the jury as it would have on a lawyer reading it in cold type and by itself. In view of the charge on this subject as a whole, in which the implication was plain and inescapable that plaintiff had a right to be irresponsible in his answers, and also the right to invoke judicial review by refusing to answer at all, the conclusion

³⁶Copies of the indictments and excerpts from the charge to the jury in the *Lawson* and *Trumbo* cases will be found in the appendix to this brief. From these it will be seen that the defendants there involved were charged with violation of Title 2, Sec. 192 of the U. S. Code for having refused, in manner closely similar to that of plaintiff here, to answer the Committee's question as to Communist membership, and that the question was held to have been pertinent.

³⁷The jury was not told under what circumstances "the bounds of the power" would be exceeded; nor were they given any guides for determining whether any question was pertinent. This omission emphasizes the error of leaving this matter of contempt to the jury.

was virtually compelled that plaintiff had not committed any contempt.

Be that as it may, the point here is that if the question of contempt *vel non* was in the case at all, it was a question of law to be decided by the court on the uncontradicted evidence before it; not a matter to be given the jury for determination of the legal effect of that evidence as they saw fit.

3. The Charge Conveyed the Erroneous Impression That a Refusal to Testify in Order to Bring About a Judicial Determination of Pertinency Would Be Lawful.

As part of the charge on the rights of witnesses before committees, the trial court instructed the jury that such a witness has the right to invoke his constitutional rights; to have those and other legal rights determined by the courts; and to that end, rightly or wrongly and even though he is subjected to penalties, to refuse to answer questions in order to secure such a determination, in which event he paves the way for contempt proceedings in the courts, not before the Committee. [R. 911-13.]

The vice of this instruction is that it connotes a want of criminality in a contemptuous refusal, so long as the refusal is inspired by an erroneous desire to preserve constitutional rights or procure a judicial determination of those rights.³⁸ In fact, however, while a witness may refuse to answer a question because he deems it to be improper, he is bound to judge correctly of its propriety; and if he does not, he is just as guilty of contempt as one whose refusal is grounded in admitted defiance of the Congressional power. [*Sinclair v. U. S.*, *supra*, 279

³⁸The constitutional right claimed by plaintiff was not any right or privilege against self-incrimination but something referred to by him as his "rights of association." [R. 483.]

U. S. at 299, 73 L. Ed. at 700, 49 S. Ct. at 274; *Fields v. U. S.*, *supra*, 164 F. 2d at 100; *Dennis v. U. S.*, *supra*, 171 F. 2d at 990; *Eisler v. U. S.* (App. D. C.), 170 F. 2d 273, 280, *cert. granted* 93 L. Ed. (adv. op.) 40; *Townsend v. U. S.*, *supra*, 95 F. 2d at 360-1.]

The conditions under which a refusal would be wrongful were not set out in the charge below, except in the abstract manner already referred to. [Point I, D, 2, *Second*, *supra*, pp. 98-9.] The fact that an intentional refusal, no matter how motivated, would be a contempt was not clearly or at all given to the jury. The impression that plaintiff had not acted wrongfully in acting as he did, could not be avoided from the charge as a whole, and it was not dissipated by any occasional sentence in it which, by itself, may have been a correct statement.

4. Since the Jurors Had to Assume That the Charge as Related to Plaintiff's Contempt Was Pertinent and Since the Charge Virtually Told Them Plaintiff Had Not Committed Contempt, the Jurors Had to Weight Their Answers to the Special Interrogatories With This Conclusion.

Irrelevant matter in a charge is necessarily confusing and misleading to the jurors, for the reason that they must assume that such matter is there because it bears upon the answer they are required to give, whether that answer is in the form of a general verdict or an answer to special interrogatories. [Cases cited, Point I, A, *supra*, p. 72.] When, as in the instant case, the charge tells the jurors in effect that it is important to determine whether plaintiff was in contempt and then virtually tells them that he was not in contempt, the jurors cannot escape the conviction that this means that their answer must be favorable to plaintiff or, at very least, that this fact of non-contempt must weigh heavily in plaintiff's favor.

E. On the Subject of Plaintiff's Conduct the Instructions Were Contradictory and Inconsistent With Each Other in Respect of Plaintiff's Obligation Under the Public Relations Clause. [Specification of Error, Nos. 8, 9.]

The public relations clause, as it was written in the contract, prohibited conduct which *tended* to produce publicly discrediting consequences of the sort specified in it. It was not made a requirement of violation that the conduct should actually have produced such consequences. The difference between the two situations is, of course, a real and substantial one. Accordingly, in that portion of the charge in which the nature of the action and of the contract was set out, the trial court informed the jury that the question to be determined was whether the conduct of plaintiff "did shock or tend to shock and offend the community and/or brought the plaintiff or tends to bring the plaintiff, into public scorn or contempt. . . ." [R. 901.]

But, in the succeeding section of the charge, after stating certain abstract rules of the law of master and servant, the trial court, in applying those rules to the facts of the pending case, ignored the fact that the contract related to conduct *tending* to public disrepute and peremptorily instructed that it was "necessary for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole personally so conducted himself that he was held in public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced the defendant or the industry in general." [R. 905-7.]

The reason for thus expanding defendant's burden of justification was said to be that in the notice of suspension

the grounds of the suspension were stated to be that plaintiff had conducted himself so as to bring himself into disrepute; and, as a matter of law, when "the contract specifies the grounds for its termination or suspension, and written notice of such ground is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. If he does not do so, by a preponderance of the evidence, he cannot justify his action upon other grounds named in the contract which, although true, were not stated in the notice." [R. 906.] This limitation to the grounds stated in the notice was repeated in another context later in the charge. [R. 917.]

First: Assuming that the reason given for this limitation was valid (the authorities, as we show in a moment, demonstrate that it is not) it still does not eliminate the obvious and direct conflict in the instructions just noted. In one breath the jury was told that in "answering the special interrogatories . . . you must determine . . . whether the conduct of the plaintiff . . . was of such character that you, as jurors can say that . . . it did . . . tend to shock and offend the community . . . or tends to bring the plaintiff, into public scorn and contempt. . . ." [R. 901]; and in the next breath they were told that it was necessary for defendant to prove that plaintiff's conduct actually had the effect of bringing him into scorn or contempt and so forth. [R. 906-7.] The cases previously cited on the prejudicial nature of conflicting instructions, *supra*, page 84, are directly in point here.

After the objectionable nature of the charge had been pointed out by defendant [R. 924-5, 943-5] one of the

instructions was modified and re-read. As modified, it adhered to the proposition that the defendant was limited to the grounds specified in the notice of suspension; stated that in that notice defendant had “notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself . . . as to bring himself or tend to bring himself into public scorn, hatred, contempt or ridicule, or shock or offend or tend to shock or offend the community. . . .”; and that, therefore, defendant had to prove “by a preponderance of the evidence that such was the case” before the jury could answer in the affirmative the first three questions submitted to them. [R. 956.]

The jury was not told which part of the original charge was replaced by the modified instruction or that there was any error in the instructions previously given; nor were those instructions expressly withdrawn. The instruction that justification was not proved if the ground stated in the notice was not established, was not changed at all. [R. 906.] Furthermore, by lumping tendency and actual effect into one sentence and then using the ambiguous phrase, “that such was the case,” in the peremptory part of the modified charge, the vital difference between the two concepts was not clarified or explained but, if anything, blurred.

The modification, therefore, cannot be held to have cured the conflict in the instructions. At best, it merely intensified and emphasized that conflict. The controlling rule here is that when “it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake.” [*Louisville & N. R. Co.*

v. Johnson, supra, 81 Fed. at 681. And to the same effect are: *Puget Sound Nav. Co. v. Nelson* (C. C. A. 9), *supra*, 59 F. 2d at 700; *Chicago etc. R. Co. v. Kelley, supra*, 74 F. 2d at 84-5; *Baer Bros. etc. Co. v. Palmer, supra*, 158 F. 2d at 280-1.]

Second: The basic premise on which the trial court acted, and which was responsible for this conflict, is a mistaken one. For the law is thoroughly settled that an employer may justify, in a case involving the employment relation, on any ground which in fact existed at the time of his action, whether or not it was specified in the notice, and even if it was unknown to him when he gave his notice. [*In re Nagel, supra*, 278 Fed. at 109; *Farmer v. First Trust Co.* (C. C. A. 7), 246 Fed. 671, 673; *Carpenter Steel Co. v. Norcross* (C. C. A. 6), 204 Fed. 537, 539-40; *Independent L. Ins. Co. v. Williamson*, 152 Ky. 818, 822, 154 S. W. 409, 411; *Macauley v. Press Pub. Co.*, 170 App. Div. 640, 646, 155 N. Y. Supp. 1044, 1048, *aff'd*. 222 N. Y. 696, 119 N. E. 1055 mem.; *Corgan v. Geo. F. Lee Coal Co.*, 218 Pa. 386, 389-90, 67 Atl. 655, 656; *Thomas v. Beaver Dam Mfg. Co.*, 157 Wisc. 427, 429, 147 N. W. 364, 365; *Beck v. Fybern Holding Corp.*, 238 App. Div. 25, 28-9, 263 N. Y. Supp. 9, 12; *Allen v. Aylesworth*, 58 N. J. Eq. 349, 351-2, 44 Atl. 178, 179.]³⁹

When the contract expressly requires that a written notice *specifying* the grounds of discharge or suspension

³⁹Many more decisions to the same effect could be cited. They may be found collected in: 39 C. J. 89, notes 70, 72; 56 C. J. §. 428, note 20; 56 C. J. S. 435, Sec. 44.

be given the employee, it has been held that the employer may justify only on the grounds so assigned. [*Kiker v. Bank Sav. L. Ins. Co.*, 37 N. M. 346, 349, 23 P. 2d 366, 368, and cases there cited.] It was this exception to the rule which the trial judge gave the jury in the case at bar. [R. 906.] But there was error in so doing for the reason that the contract in suit *does not* require any such notice. The instruction was not applicable to the case submitted to the jury.

It was also a misapprehension of the contract to have assumed as a fact in the charge that the contract specified the grounds for termination or suspension. Connected, as this reference was, with the theory set forth in the charge that justification was limited to the grounds specified in the notice of suspension, it must have been construed by the jury as an intimation that no grounds other than those mentioned in the notice were covered by the agreement. The contract, however, expressly provides that it may be terminated *or* the employee's compensation suspended for "failure, refusal or neglect of the employee to perform his required services or observe *any of his obligations*" thereunder. [R. 17. Italics ours.] One of the employee's obligations was, of course, not to do anything which would *tend* to bring him into public disrepute. Furthermore, even if the contract had specified the grounds of suspension, it would not necessarily have precluded resort to others in justification. [*Corman Aircraft Corp. v. Weihmiller* (C. C. A. 7), 78 F. 2d 241, 243.]

F. Since Courts Will Take Judicial Notice That a Large Part of the American Public Looks With Scorn and Contempt on Persons It Believes to Be Communists the Jury Should Have Been so Instructed. [Specification of Error, No. 13.]

Defendant requested the trial court to charge that a fact judicially noticed was deemed to have been established without any evidence, and that such a fact was that "many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers." The request was refused. [R. 128-9, 101.] It should have been given, especially as the court refused to receive direct evidence of the fact and informed defendant that the jury would be permitted to decide that question from their personal knowledge of the state of public feeling in their own communities. [R. 617-20, 719-20, 829-39.]

First: The Federal courts are now required to receive "all evidence which is admissible . . . under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. . . ." [F. R. C. P., Rule 43(a).] Judicial notice is, of course, a rule of evidence so that the state rules and statutes in that regard furnish at least one source of Federal practice. [*Hagen v. Porter* (C. C. A. 9), 156 F. 2d 362, 365.] In California "the court is bound to declare [its judicial] knowledge to the jury, who are bound to accept it." [*Cal. Code of Civil Procedure*, Sec. 2102; *People v. Mayes*, 113 Cal. 618, 625-6, 45 Pac. 860.]

Second: Courts generally will take judicial notice of public attitudes, beliefs and states of mind which are

matters of common knowledge.⁴⁰ Even if there were no decisions directly in point on the facts, this proposition would compel judicial notice of the current attitude in this country toward Communists. One cannot read a daily newspaper or hold any ordinary conversation on current affairs without observing overflowing evidence of this attitude.

Actually, however, there are a number of cases which may be cited in support of the application of the general rule to the exact case of public feeling about Communists.⁴¹ They are the cases holding it libelous *per se* falsely to accuse one of being a Communist or a Communist sympathizer. The necessary premise of such a

⁴⁰Examples of this rule are: *State of Calif. v. Anglim* (C. C. A. 9), 129 F. 2d 455, 459, *cert. den.* 317 U. S. 669 (that a certain concept concerning railroad employees is reasonable, based on the court's knowledge of the minds of workmen); *Penn. Co. v. Helvering* (App. D. C.), 66 F. 2d 284, 285 (large number of persons oppose vivisection); *James v. Kuhn*, 121 Cal. App. 69, 71, 8 P. 2d 526, 527 (contemporaneous events of general knowledge and repute); *Vremeister v. White*, 179 N. Y. 235, 239-40, 72 N. E. 97, 98-9 (common belief of people of New York in 1904, that vaccination is a preventive of smallpox); *Roseland v. Miller*, 139 N. Y. 93, 102-3, 34 N. E. 765, 767 (undertaking business in a residential neighborhood would be offensive to people of ordinary sensibilities); *McGuire v. State*, 76 Miss. 504, 513-14, 25 So. 495, 497-8 (many persons called for jury duty are opposed to capital punishment and that Christian people regard life imprisonment as a more merciful punishment); *Axton etc. Tool Co. v. Evening Post Co.*, 169 Ky. 64, 84, 183 S. W. 269, 276-7 (in 1916, union labor constituted a well-organized body whose organization rules were carefully observed by their members); *Indianapolis Journal etc. Co. v. Pugh*, 6 Ind. A. 510, 517, 33 N. E. 991, 993 (public has a sympathetic feeling toward the soldiers who fought in the Civil War and toward their widows and children).

⁴¹Note that this is not a question of taking judicial notice of the objects or methods of the Communist Party, but of the state of the public mind, the beliefs of the public or of a large part of it, with regard to Communism and Communist Party membership.

holding is, of course, the court's judicial knowledge that such a charge would subject one to obloquy because there are many average and respectable persons who look with scorn and contempt upon Communists and their sympathizers. [*Spanel v. Pegler* (C. C. A. 7), 160 F. 2d 619, 622; *Grant v. Reader's Digest Ass'n.* (C. C. A. 2), 151 F. 2d 733, 734-5, *cert. den.* 326 U. S. 797; *Mencher v. Chesley*, 297 N. Y. 94, 100-1, 75 N. E. 2d 259-60; *Galagher v. Chavalas*, 48 Cal. App. 2d 52, 57, 119 P. 2d 408, 412; *Wright v. Farm Journal*, *supra*, 158 F. 2d at 978-9; *Washington Times Co. v. Murray* (App., D. C.), 299 Fed. 903, 905-6; *Annotation*, 171 A. L. R. 709. See, note 23, *supra*, p. 71.]

Third: The fact that in the charge on libel and the status of the Communist Party, the trial court told the jury that an accusation of Communism "would expose a person to the hatred, contempt and ridicule of many persons" was not the equivalent of the charge requested by defendant. In the first place, this statement was not given to the jury as a fact judicially noticed which they were bound to accept in lieu of evidence, but only as an explanation of why it was libelous as a matter of law falsely to accuse one of being a Communist. In the second place, it was so surrounded by other confusing and misleading instructions on the law of libel and the legal status of the Communist Party, that whatever effect it might otherwise have had was completely nullified. [Point I, A, B, *supra*, pp. 70-77.] And in the third place, it did not include non-Communists who nevertheless sympathize with or in

some way support the Communist program but who, as the cases above cited show, are nevertheless embraced within the range of the public feeling of scorn and contempt. [E. g., see *Spanel v. Pegler*, *supra*, 160 F. 2d at 623.]

Fourth: Neither was it an adequate substitute for defendant's requested instruction, to permit the defendant to argue the issue on the basis of the jury's personal knowledge. Such an argument, with no evidence, or charge on judicial notice, vouched to its support, could not possibly have had the impressive or persuasive force of an argument founded on the record. Particularly was this true when it is recalled that the jury was instructed that the "statements, arguments, comments or suggestions [of counsel] are not evidence and must not be considered as such by you. . . . You are to decide this case solely upon *the evidence* that has been introduced before you and the inferences which you may deduce therefrom. . . ." [R. 895; italics ours]; and also that in determining whether plaintiff's conduct had the discrediting effect or tendency claimed by defendant they were "not to speculate or to guess. If . . . not satisfied by a preponderance of *the evidence* that such was the fact, you are to find that his conduct did not have any of the effects stated in the [public relations] clause." [R. 903-4. Italics ours.] From the viewpoint of the jurors there was no "evidence" and for all practical purposes the jury was instructed that the defendant had failed in its proof.

II.

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN ITS RULINGS ON THE ADMISSION AND EXCLUSION OF EVIDENCE.

- A. The Plaintiff Having Opened the Door to Evidence of Joint Action by the Motion Picture Industry Against All Ten of the Unfriendly Witnesses Because of Their Conduct Before the Congressional Committee, Defendant Was Entitled to Show What That Conduct Was. [Specification of Error, No. 1.]

As has been noted in our Statement of the Case, *supra*, pages 21-23, plaintiff was allowed to show, as part of his case-in-chief, that representatives of virtually all motion picture producing companies had agreed upon a statement of policy not to continue to employ any of the ten unfriendly witnesses who, before the Committee, refused to reveal whether they were Communists. It is apparent from the face of this statement of policy that it was not prompted by the action of plaintiff alone, but by the conduct of all of the ten. [R. 285-6.] And it is also self-evident that the cumulative effect of the spectacle of ten highly placed motion picture personalities, acting apparently in concert to defy the Congress in its investigation of Communism in the movie industry, would be much more likely to create public indignation and resentment against the industry than if just one writer had so conducted himself.

Nevertheless, whenever defendant attempted to prove the conduct of all ten of the unfriendly witnesses, the evidence was held irrelevant and immaterial, the trial court taking the position in this regard that defendant was limited to proof of what plaintiff and plaintiff alone had done. [R. 651, 721-2, 731-6, 827-8, 850-5, 622-3, 715-16.] That evidence was admissible for at least two reasons.

First: Plaintiff opened the door by proving the adoption of a policy based on the alleged conduct of these ten men. Certainly, then, the defendant should have been permitted to show what the conduct was and to what extent plaintiff was a part of it. Without such evidence the presentation to the jury was one-sided. There was before them only the statement of policy. There was no evidence, however, which the jury was entitled to consider, as to the existence in fact of the reasons which prompted its adoption.⁴² Admissibility of this evidence would seem to be established by Section 1854 of the *California Code of Civil Procedure*, which is to the effect that when "part of an act . . . is given in evidence by one party, the whole on the same subject may be inquired into by the other; . . . and when a detached act . . . is given in evidence, any other act . . . which is neces-

⁴²The testimony as to the discussions which took place over the adoption of this policy was limited to proof of the fact of discussion and the jury was specifically admonished that it did not prove the facts recited. [R. 385-6, 792-3.]

sary to make it understood, may also be given in evidence.” [See, also, *Hinton v. Welch*, 179 Cal. 463, 465-6, 177 Pac. 282, 283; *Reeves v. Vallow*, 16 Cal. 2d 95, 99-100, 104 P. 2d 1017, 1020. Compare, *Liberty Bank v. Ernst*, 93 Cal. App. 560, 563, 269 Pac. 959, 960; *Miller v. Magill*, 130 Cal. App. 414, 418, 20 P. 2d 58, 59.]

Second: There was evidence below of such concert of action among the unfriendly witnesses as would have justified an inference that they acted as they did in pursuance of an agreed plan or confederation. [*Statement of the Case*, B, 2, *supra*, pp. 20-21.] In fact there was evidence of an express admission by plaintiff that just such an agreement had been made. [R. 362.] The legal effect of that kind of an agreement is to make each one of the confederates responsible for the acts of the others in furtherance of the common design. [*Dodge v. Meyer*, 61 Cal. 405, 421-2; *Mox Incorporated v. Woods*, 202 Cal. 675, 677-8, 262 Pac. 302, 303; *Revert v. Hesse*, 184 Cal. 295, 301-3, 193 Pac. 943, 946.] The proffered evidence was, therefore, admissible to show the conduct with which plaintiff was chargeable fully as much as his own.

B. Evidence of the Actual State of Public Opinion With Respect to Communism Generally and the Conduct of Plaintiff Specifically Should Have Been Admitted as Bearing Directly on the Issue of the Tendency of That Conduct to Excite Public Scorn and Contempt. [Specification of Error, Nos. 2, 3.]

Defendant sought in three different ways, but was not permitted, to introduce evidence of the actual state of public opinion with respect to Communism and plaintiff's conduct. First, by Mr. Max Eastman, a witness who was admittedly qualified as a student and analyst of Marxism and Communism, who had traveled throughout the United States for several years lecturing on the subject and who was, therefore, in a position to testify to his observations of the public's attitude, it was offered to prove the public feeling in this country toward the Communist Party. [R. 829-44.] Defendant also offered, as some evidence of public reaction to plaintiff's conduct, and as the source of or inspiration for the attitude of their readers, a collection of several hundred editorials which appeared in newspapers throughout the country.⁴³ [R.

⁴³The editorials so offered were marked for identification only and are part of the record on appeal, but because of their bulk were not designated for printing. Typical examples of the mass are printed in the appendix to this brief. For present purposes, it will serve to say that the editorials appeared in newspapers in every section of the United States; that they commented on the Committee hearings generally and on the conduct of the unfriendly witnesses; and that while opinion was divided as to the hearing itself and certain of its procedural features, they were almost unanimous in their condemnation of the Communist Party and of the conduct of the witnesses who refused to say whether they were members of the Communist Party. In this latter connection, many of the editorial writers drew the inference, from such refusal, that the men were in fact Communists, and stated that their conduct was an insult to the public, that it was contemptuous in fact as well as law, that it raised doubts as to their loyalty, and the like.

C. Defendant Should Have Been Permitted to Prove the Illegality of the Communist Party Because of Its Advocacy of Force and Violence, Especially as the Jury Was Instructed That Its Legal Status Should Be Considered in Determining the Effect of Plaintiff's Conduct. [Specification of Error, No. 4.]

Defendant offered to prove, by a witness whose competency was not questioned, that the Communist Party of America advocates the overthrow of our form of government by force and violence and is an agent of a foreign power. The proof was not allowed to be made. [R. 829-44.] We have already pointed out that this evidence would have established the unlawful character of the party and of knowing membership in it; and that in the absence of such testimony the trial court was enabled to tell the jury, in effect, that membership was not a crime in California, which fact was to be considered by them in determining whether plaintiff's conduct had the consequences claimed for it by defendant. [Point I, B, *supra*, pp. 74-77.] The argument and cases there referred to, we submit, demonstrate the error of the ruling excluding defendant's evidence, as well as in the charge which was the immediate subject of the previous discussion. We add a brief word on another aspect of the question of admissibility.

It takes no great student of "the usual propensities or passions of men . . ." to draw the inference that membership in an organization of the sort which defendant sought to prove the Communist Party was and

is, and whose leaders are even now publicly committed not to support this country in the event of war with Russia, would be looked upon by the great mass of loyal Americans with at least scorn and contempt. The evidence, therefore, bore directly on the issue of public attitude which lay at the bottom of this case. It was admissible under the California rule that any evidence of a fact which has "a reasonable tendency to facilitate a fair conclusion on a controverted issue" is material. [*Miller v. Magill*, *supra*, 130 Cal. App. at 418, 20 P. 2d at 59; *Ellis v. Woodburn*, 89 Cal. 129, 132, 26 Pac. 963; *Kurokawa v. Saroyan*, 95 Cal. App. 772, 777-8, 273 Pac. 613, 615; *Coffee v. Williams*, 103 Cal. 550, 558, 37 Pac. 504, 507. The Federal rule is the same: *Home Ins. Co. v. Weide*, 78 U. S. 438, 440, 20 L. Ed. 197, 198.]

D. Defendant's Cross-Examination of Plaintiff Was Unduly Limited When Inquiry if Plaintiff's Real Reason for His Conduct Was a Desire to Avoid Revelation of Communist Party Membership Was Not Permitted. [Specification of Error, No. 5.]

In the course of his testimony, plaintiff took the position that in refusing to answer the Committee's question as to Communist Party membership he was seeking to uphold his "rights of association" and the constitutional rights of citizens generally. [R. 483; 631; 633; 547-8.] This explanation must have been given considerable credence by the jury in view of the detailed charge on the right of witnesses so to conduct themselves. [R. 911-13.] And certainly, the giving of that charge was a clear indication that plaintiff's motive was thought by the trial court to have a material bearing on the issues of fact to be decided. It, therefore, would seem clearly to have been within the scope of legitimate cross-examination to inquire, as defendant was not permitted to do [R. 597-603; 613-17; 674-7], whether plaintiff's real reason or motive, instead of being the one expressed by him, was the somewhat less creditable one of a desire to avoid disclosing party membership. [*Cal. Code of Civil Procedure*, sec. 2048; *Estate of Flood*, 217 Cal. 763, 784-5, 21 P. 2d 579, 587; *People v. Flores*, 15 Cal. App. 2d 385, 401, 59 P. 2d 517, 526; *Jackson v. Feather River Water Co.*, 14 Cal. 18, 23-4; *Heard v. U. S.* (C. C. A. 8), 255 Fed. 829, 831-2; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (C. C. A. 8), 129 Fed. 668, 674.]

This line of examination was also proper in its own right, *i. e.*, as directed to a fact from which an inference as to public feeling toward plaintiff could have been drawn, much as in the case of the evidence relating to the objects of the Communist Party generally. [See, arguments and cases cited, Point II, C, *supra*, pp. 116-17.]

E. Defendant's Cross-Examination of Plaintiff Directed to Showing the Latter's Wilfulness and Intent Was Unduly Restricted. [Specification of Error, No. 6.]

On cross-examination of the plaintiff, defendant sought to inquire into plaintiff's sources of knowledge and actual knowledge of the state of public feeling toward Communism, into his awareness and consideration of that feeling and of the possible public consequences *vis-a-vis* his conduct, at the time he determined to act as he did before the Committee. This line of inquiry was shut off by the trial court. [R. 590-619.]

It seems plain to us, however, that this too was a legitimate field of cross-examination. [Cases cited, Point II, D, *supra*, p. 118.] Defendant assuredly was entitled to show that plaintiff had acted wilfully and with a realization of the possible reaction to his conduct. The trial judge thought plaintiff's wilfulness and intent were important elements of the case, for he instructed the jury on those subjects and imposed upon defendant the burden of proving their existence by a preponderance of the evidence. [R. 904. See, also 601-2.] If they were subjects worthy of mention in the charge, they were emphatically proper matters upon which to address some questions to the person whose wilfulness and intent were in issue.

F. Evidence of Payment of Salary and Continued Exhibition of Motion Pictures for Which Plaintiff Had Written the Screenplay Was Irrelevant and Not Within the Issues. [Specification of Error, No. 7.]

Over defendant's objection specifically grounded on the claim that the evidence was irrelevant and went beyond the issues, the trial court permitted plaintiff to prove that his salary had been paid by defendant after the Committee hearing and to the date of suspension; and that also subsequent to the hearing, defendant had continued to distribute various motion pictures on which plaintiff had worked. In the latter connection, the evidence included details as to the number of bookings. [R. 694-6; 863-7. See note 11, *supra*, p. 24.]

There was, of course, other evidence now relied upon to support the claim of waiver or condonation [*Statement of the Case*, B, 4, b, c, d, *supra*, pp. 24-31]; but that evidence was offered and received on other issues. The absence of objection to this last mentioned evidence did not have the effect of injecting the unpleaded issue of waiver into the case. [*Riverside Water Co. v. Gage*, 108 Cal. 240, 245, 41 Pac. 299, 300; *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 Pac. 502, 503; *Baar v. Smith*, 201 Cal. 87, 99-100, 255 Pac. 827, 832.]

The evidence to which objection was made was erroneously admitted, because it related to a matter outside the pleadings and the issues as settled by the pre-trial order. [Cases cited, Point I, C, *supra*, pp. 78-79;

County of Macon v. Shores, 97 U. S. 272, 277, 24 L. Ed. 889.]

Inadmissibility of the evidence relating to distribution was further established by the fact that such distribution was in no wise inconsistent with suspension or termination of the employment contract and was, therefore, no evidence of waiver. [See, *Medico-Dental etc. Co. v. Horton & Converse*, 21 Cal. 2d 411, 432, 132 P. 2d 457, 469. Generally, see 67 C. J. 304, sec. 7.] Under the employment contract defendant became the absolute and unconditional owner of the products of plaintiff's services; had the unrestricted right to use those products in its pictures; was, of course, the owner of the pictures and had the complete right to distribute and disseminate them. These rights survived any termination or suspension of the contract, so that exercise of them was obviously not inconsistent with the position that plaintiff's employment was suspended or his contract terminated. [R. 9-11.]

III.

THE CAUSE SHOULD HAVE BEEN TRANSFERRED TO ANOTHER JUDGE BECAUSE OF THE TRIAL JUDGE'S PERSONAL BIAS AND PREJUDICE CONSISTING OF THE EXTRA-JUDICIAL EXPRESSION OF AN OPINION ON THE MERITS OF THE CONTROVERSY ADVERSE TO DEFENDANT AND BASED ON INFORMATION OBTAINED OTHERWISE THAN IN THE COURSE OF THE PROCEEDINGS. [Specification of Error, No. 15.]

Pursuant to Title 28, U. S. Code, sec. 144 [formerly Judicial Code, sec. 21, 28 U. S. C. A., sec. 25], defendant filed a verified application to transfer the cause from the District Judge to whom it had been assigned, on the ground of personal bias and prejudice based on matters which are set out in the Statement of the Case, *supra*, p. 38.

The affidavit on which this application was based recited in detail the source of the affiant's information; the dates on and circumstances under which it obtained that information; made the general averment of its belief that the District Judge had a personal bias and prejudice against defendant and in favor of plaintiff in respect of the pending cause; gave the facts and reasons upon which that belief was based; and bore the appropriate certificate of counsel of record. [R. 43-6.] It was, therefore, formally sufficient. [*Berger v. U. S.*, 255 U. S. 22, 32-6, 65 L. Ed. 481, 485-7, 41 S. Ct. 230, 233-4; *Nations v. U. S.* (C. C. A. 10), 14 F. 2d 507, 509-10, *cert. den.* 273 U. S. 735.] Under the Federal practice the District Judge was required to accept the facts averred as true. His only function was to pass upon their legal sufficiency.

If found sufficient his recusation became imperative and he was without power thereafter to act in the cause.⁴⁴ [*Berger v. U. S.*, *supra*; *Nations v. U. S.*, *supra*; *Mitchell v. U. S.* (C. C. A. 10), 126 F. 2d 550, 552, *cert. den.* 316 U. S. 702, *rehear. den.* 324 U. S. 887; *Lewis v. U. S.* (C. C. A. 8), 14 F. 2d 369, 371; *Schmidt v. U. S.* (C. C. A. 6), 115 F. 2d 394, 397; *Morris v. U. S.* (C. C. A. 8), 26 F. 2d 444, 449.] The District Judge, however, held the affidavit insufficient and continued to preside in the cause until its final disposition in the trial court. [R. 47-76; 77; 168-9.] In so ruling and acting there was, we respectfully submit, error requiring a reversal of the judgment appealed from.

The personal bias or prejudice which disqualifies a Federal judge is shown by facts which "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment . . ." [*Berger v. U. S.*, *supra*, 255 U. S. at 33-4, 65 L. Ed. at 485, 41 S. Ct. at 233. See also, *Mitchell v. U. S.*, *supra*, 126 F. 2d at 552; *State v. Himes*, 144 Fla. 145, 147-8, 197 So. 762, 763; *Wiedemann v. Weidemann* (Minn. 1949), 36 N. W. 2d 810, 812.] Such facts may, and usually do, consist of the formation and expression of an extrajudicial opinion upon the merits of the cause, based upon sources of information other than the evidence and proceedings in the case. [*Berger v. U. S.*, *supra*; *Nations v. U. S.*, *supra*, 14 F. 2d at 509-10; *McFadden v. U. S.* (C. C. A. 7), 63 F. 2d 111, 112; *Moskun v. U. S.* (C. C. A. 6), 143 F. 2d 129, 130; *Whitaker v. McLean* (C. A.,

⁴⁴At appellee's request counter-affidavits filed by the District Judge have been printed in the record. These affidavits, however, cannot be considered for any purpose. [Cases cited in the text, above.]

D. Col.), 118 F. 2d 596; *Schmidt v. U. S.*, *supra*, 115 F. 2d at 397; *Lewis v. U. S.*, *supra*, 14 F. 2d at 371.]⁴⁵

Exactly that "bent of mind" derived from precisely such extra-judicial sources is established by the instant affidavit. In this connection it should be noted that the case at bar was commenced in the State court on January 7, 1948, ordered removed to the District Court on February 2, 1948, and the record actually filed in that court on February 25, 1948. [R. 38-9.] The District Judge's remarks were made not later than the early part of January, 1948. [R. 44.] Of necessity, then, they must have been based on extra-judicial information, since the cause had not yet been removed to the Federal court, nor had any proceedings been had or any evidence been taken in that court at the time in question. On the other hand, the purported facts of the controversy had been widely publicized [*Statement of the Case*, B, 1, *supra*, p. 19]; and the District Judge was aware of that publicization, as is shown by comments made by him at a hearing held before the affidavit was filed, and before any evidence had been taken. [R. 228-9.] The opinion expressed, plainly indicating as it did a complete pre-judgment of appellant's liability in the premises derived *non coram judice*, was in full measure the expression of a disqualifying personal bias and prejudice within the teaching of the cases cited.

The argument, which prevailed with the District Judge, that mere pre-judgment does not amount to the personal bias or prejudice aimed at by the statute is untenable when tested by those cases. True enough a pre-judgment,

⁴⁵The matters which brought about disqualification in the *Moskun* and *Lewis* cases do not appear in the reported opinions. Appropriate excerpts from the records in those cases appear in the appendix to this brief.

when judicially expressed and based upon proceedings and evidence in the cause, does not always bring the disqualification statute into operation;⁴⁶ nor does an impersonal attitude or opinion derived from the judge's background or experience. [*Price v. Johnston* (C. C. A. 9), 125 F. 2d 806, 811-12, *cert. den.* 316 U. S. 677, *rehear. den.* 316 U. S. 712; *Sacramento Suburban etc. Co. v. Tatham* (C. C. A. 9), 40 F. 2d 894, *cert. den.* 282 U. S. 878; *Henry v. Speer* (C. C. A. 5), 201 Fed. 869, 871-2.] But that is a far different matter from an opinion on the merits of a pending action derived *non coram judice*. The latter type of pre-judgment is the very kind of personal bias and prejudice at which the statute is directed. [*Craven v. U. S.* (C. C. A. 1), 22 F. 2d 605, 607-8, *cert. den.* 276 U. S. 627; *Ferrari v. U. S.* (C. C. A. 9), 169 F. 2d 353, 355; *Moskun v. U. S.*, *supra*, 143 F. 2d at 130; *Schmidt v. U. S.*, *supra*, 115 F. 2d at 397; *U. S. v. 16,000 Acres of Land* (D. C.), 49 F. S. 645, 649; *In re Beecher* (D. C.), 50 F. S. 530, 532; *Ryan v. U. S.* (C. C. A. 8), 99 F. 2d 864, 871. See, also, *Clarke v. Commonwealth*, 259 Ky. 572, 573, 82 S. W. 2d 823, 824; *People v. District Court*, 60 Colo. 1, 10, 152 Pac. 149, 154.]

General language in a few decisions to the effect that pre-judgment is not bias or prejudice must be read with this distinction in mind and with regard for the actual facts with respect to which the dictum was uttered. It will then be seen that the generalization upon which the District Judge relied appears only in cases where the

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recused judge's allegedly disqualifying opinion was rendered in the very cause in which his disqualification was sought or in a connected case and was based on judicial proceedings had before him.

The decision from which this dictum seems to stem is *Henry v. Speer*, *supra*, 201 Fed. at 871-2. The facts there involved are more fully stated in the District Court's opinion on the same matter, found in *Henry v. Harris* (D. C.), 191 Fed. 868. It will be seen from the latter report that the pre-judgment complained of was a judicial opinion based on knowledge obtained from proceedings in the cause. The distinction to which we have adverted was there made, as may be seen from the syllabus, prepared by the court, in which the rule is said to be that "It is not sufficient to disqualify a judge . . . to allege that he has formed an opinion as to the law of the case and the rights of the parties, when it has been *judicially formed* and published for legitimate purposes . . ." [Italics ours.]

This distinction has been recognized in the Ninth Circuit. In *Ferrari v. U. S.*, *supra*, 169 F. 2d at 355, this court, citing *Craven v. U. S.*, *supra*, 22 F. 2d at 607-8, said that "personal bias . . . has been held to be an attitude of *extra-judicial origin* . . ." and therefore, could not be held to have been shown by a "*Judicial opinion formed on evidence* in a hearing against others . . ." [Italics ours.] If effect is given to this difference in the case at bar, the statutorily compelled disqualification of the trial judge is fully established in the record.

CONCLUSION.

Each one of the errors which we have discussed was substantial and materially affected an important part of the defendant's case. Both singly and in cumulative effect the serious and prejudicial consequences of the trial court's rulings were such as to have prevented a full and fair presentation of the defendant's case. The judgment, therefore, should be reversed with a direction to the trial court that any further proceedings in the cause should be had before another district judge.

Respectfully submitted,

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No. 12222.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

**APPENDIX TO APPELLANT'S OPENING
BRIEF.**

FILED

JUN 22 1949

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APPENDIX TO APPELLANT'S OPENING BRIEF.

I.

State Statutes Cited.

California Criminal Syndicalism Act [Cal. Stats., 1919, p. 281]:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who:

* * * * *

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism;"

* * * * *

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

California Code of Civil Procedure:

"Section 1854: When part of a transaction proved, the whole is admissible. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act,

declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.”

“Section 1960: When an inference arises. An inference must be founded:

“1. On a fact legally proved; and,

“2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.”

“Section 2102: Questions of law addressed to the court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.”

California Civil Code:

“Section 1698: [Written contracts, how modified.] A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.”

II.

Federal Statute Cited.

U. S. Code, Title 28, Sec. 144:

“§144. Bias or prejudice of judge.

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has

a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

“The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.”

III.

Excerpts From Record in Various Cases Cited.

1. *Moskun v. U. S.* (C. C. A. 6), 143 F. 2d 129.

The following excerpt from the Record on Appeal shows the comments of the trial court which were the subject of the decision cited:

“The Court: Well, you are not the only one. I didn’t get one of these, and what I don’t like about some of these things, and you do yourself more harm than you do good, but I got a letter from the President—what is his name?

“Mr. O’Brien: Mr. Thomas:

“The Court: Mr. Thomas, I don’t know what it is, but he wrote me a long letter. That is not the way cases are tried in Court. They ought to have a different appreciation of legal procedure. The President of a Union has no more influence than the ordinary witness that comes along, and why does he write me a letter? Why does he write me a letter, the Judge who is hearing the case? I don’t like that at all. It looks to me as though you are putting on the pressure. I am not opposed to Unions, but if the Unions would use a little discretion and judgment,

you would get along better. You can't go into a Court, and put the heat on.

"Mr. Eden: I had not seen that—

"The Court: Here is something here, I don't know what it is. (Reads resolution on Nicholas Moskun, Exhibit F.)

"I consider that a damned insult, if you want the plain English of it, and the petition here for citizenship is denied. If you think they can put the heat and the pressure on the Courts, we give them notice now they can't do it.

"Mr. Eden: May it please the Court, I don't think Mr. Moskun's citizenship—

"The Court: I don't know anything about it, but it looks to me as though some of you people have got an idea you can run the Courts. It can't be done. I sought to try this case and to hear it on the facts presented.

"Mr. Eden: I think Your Honor has, and I think Your Honor should decide it on the facts.

"The Court: I am deciding it on the facts now, and I based them on the opinion I had before, and those facts and the evidence in that case showed this man guilty of such misconduct that indicated to the Court that he wasn't favorable to our form of government, and under our Constitution of the United States tended to act in a very revolutionary manner. We have all got to abide by the laws whether union men or whether you are non-union men. I say to you now I have no feeling against the union, but just to show you those fellows can't be encouraged in trying to put the pressure, I make this decision now, and I deny the petition for citizenship.

"Mr. Eden: I would like to ask the Court to consider the evidence presented on Mr. Moskun's petition, and not on somebody's resolution, over which he has no control.

“The Court: All right, the petition is denied. You may prepare an order and appeal.”

2. *Lewis v. U. S.* (C. C. A. 8), 14 F. 2d 369.

The following is the affidavit, filed in respect of the disqualification of the District Judge, referred to but not quoted in the opinion cited:

“The affiants Allie E. Lewis and William Lloyd Lewis respectfully represent and state that jointly and severally they verily believe and charge that his Honor, Judge Franklin E. Kennamer, has a personal bias and prejudice against them and each of them and in favor of the Government, by reason of which said Judge is unable to impartially exercise his functions as Judge in this case; that by reason of said personal bias and prejudice neither of these defendants can receive a fair and impartial trial before him. The grounds for the defendants’ beliefs are the following facts, to-wit:

“The defendants state upon information and belief that the Honorable Franklin E. Kennamer, in the City of Tulsa, Oklahoma, after the organization of the United States District Court for the Northern District of Oklahoma, created and organized pursuant to the Act of Congress of February 16, 1925, made addresses before certain civic clubs and churches of that city on the subject of law enforcement; that in all these addresses he told his audience, in substance, and through them the general public, that he intended to bear down with heavy hands on all offenders against Federal Criminal laws; and that during the course of his address before one of said clubs, namely, the Kiwanis Club, on or about the 13th day of April, 1925, he stated that the higher the law violator’s collar and the whiter his shirt the longer his sentence would be in this court, and that the longer his list of witnesses the heavier his sentence would be.

“The defendants further state that the Hon. R. L. Williams was the Presiding Judge on the first trial of this case at Hugo, Oklahoma, beginning May 16, 1925, and ending on the 27th day of May, 1925; that the jury on said first trial was unable to reach an agreement after being out approximately thirty-four hours, and the jury was discharged and a mistrial declared; that the Hon. Franklin E. Kennamer was the Presiding Judge on the second trial of this case at Muskogee, Oklahoma, beginning July 20, 1925, and ending July 28th, 1925. They further state on information and belief that on the first trial the jury was nearly evenly divided; that on the second trial the jury stood ten to two for conviction on the first count, and on all other counts in the indictment the standing of the jury ranged from nine to three down to seven to five in favor of conviction; that prior to the commencement of said second trial the Hon. R. L. Williams, who is judge of the United States District Court for the Eastern District of Oklahoma, tendered the Hon. Franklin E. Kennamer the use of his chambers in the Federal Building at Muskogee, Oklahoma, during the trial of this cause, but that the Hon. Franklin E. Kennamer declined to use same, saying that he preferred to use the United States District Attorney’s office as his chamber, and that he did throughout said trial use the District Attorney’s office in the Federal Building at Muskogee, Oklahoma, as his chambers; that he associated in public and in private throughout said trial with Nugent Dodds, Mr. Frank Lee, Mr. John M. Goldsberry and Joseph A. Genau, Mr. Dodds being an Assistant United States Attorney General assigned to the prosecution of this case, Mr. Frank Lee being the United States District Attorney for the Eastern District of Oklahoma, Mr. John M. Goldsberry being the United States District Attorney for the Northern District of Oklahoma,

who had been invited to, and did, assist in the prosecution of this case, both at Hugo and at Muskogee, and Mr. Joseph A. Genau being the special accountant out of the Department of Justice assigned to said case and who worked up the evidence in the case and who was one of the Government's chief witnesses on the trial; that Judge Kennamer during said trial frequently walked from the Federal Building to the Severs Hotel, where he was stopping during the trial, and from the Severs Hotel to the Federal Building with one or more of the government's attorneys, and frequently ate his meals at said hotel and at the Red Arrow Cafeteria with one or more of the Government's attorneys; that Judge Kennamer frequently from time to time held private conferences with the Government's attorneys in regard to said case, both in the District Attorney's office and in their rooms at the hotel, and that he and attorneys Dodds and Goldsberry visited with each other in their rooms at the hotel far into the night; that Judge Kennamer prepared his instructions in said case in the office of the District Attorney with the counsel and advice of said Government attorneys, without the presence or consent of the defendants or any of their counsel; that Judge Kennamer's association with the Government's attorneys during the trial of said cause was so pronounced that it created unfavorable comment on the part of many people.

"Defendants further state on information and belief that on Sunday, July 26, 1925, Judge Kennamer said to Cal Wheeler, a deputy clerk in this court, that 'if the defendants are innocent in this case then that boy I sentenced to a year and a half in the Federal Penitentiary from Ada ought to be brought back from the penitentiary and given one thousand dollars to boot.'

“The defendants further state that on Monday morning, July 27th, 1925, at about nine O’clock, the jury was brought in and the foreman asked by the court if he had any report to make, whereupon the foreman said that the jury was unable to agree, and the court gave the jury further instructions over the defendants’ objection, although the foreman stated that they did not want any further instructions from the court; and shortly before noon of the same day the jury again reported that it was unable to agree and was sent back for further deliberation by the court; at about four O’clock in the afternoon of the same day the jury again reported that it could not agree and the court gave the jury further instructions. Just before six o’clock P. M. of the same day the jury was called into the court room to be sent out for supper, and the court observed one of the jurors, E. A. Edmondson, and one of the defendants, William Lloyd Lewis, smile at each other one time, and in open court in the presence of the jury severely censured the juror and told him his conduct was in contempt of court, and then sent the jury out for further consideration of their verdict, and after the jury had retired the court said to Mr. Lewis in open court that he would take the matter up between him and Mr. Edmondson in the morning. On the following morning at about nine o’clock, July 28, 1925, the court called the jury in and upon being advised by the foreman in response to his question that the jury was unable to reach a verdict, discharged the jury from further consideration of the case, and ordered juror Edmondson and defendant William Lloyd Lewis into the custody of the United States Marshal pending the hearing of contempt charges against them. The Court then ordered all the jurors except Mr. Edmondson to go back to the United States District

Attorney's office for the purpose of an investigation, and the jurors were there questioned with reference to what juror Edmondson had said and done in the jury room, and as to how the jury voted on the different counts of the indictment; that the jurors were then brought back into the court room and several of them placed upon the witness stand, after being sworn, and were questioned by the United States District Attorney and by the court relative to the conduct of juror Edmondson and other jurors during the deliberations of the jury in the jury-room. Upon the conclusion of said contempt hearing the court assessed a fine of five hundred dollars against the juror Edmondson and against the defendant William Lloyd Lewis and committed them to the custody of the marshal until said fines were paid. That Judge Kennamer said from the bench before passing sentence on the juror Edmondson and the defendant William Lloyd Lewis that: 'I am thoroughly convinced from the statements of the juror, Paul Harris, and one other juror whose name I do not recall at this time, in view of the overwhelming testimony introduced in this case, I might say testimony from witnesses whose reputation for truth and veracity is not challenged, the undisputed testimony of the records themselves, and the law as the court instructed the jury, that there has been a gross miscarriage of justice in this case, and that Mr. Edmondson is wholly responsible for it.' Whereas in truth and in fact two jurors voted not guilty on the first count of the indictment and the jurors stood on the other counts of the indictment submitted to them in the ratio of from nine to three down to seven to five in favor of conviction; that juror Edmondson and juror Couch voted not guilty on every count in the indictment submitted to them.

“The court further said at that time :

‘The government has brought witnesses from foreign states, they have brought numerous witnesses, they have testified in the case. On many material and essential issues involved there was not any evidence arising to the dignity of testimony that contradicted their statements, still, the case is undecided, simply in my judgment, because a juror did violence to his oath.’

“The court also said at the same time in the same connection :

‘A single act of the nature committed by the juror would be enough to warrant the court in concluding the trial at the time such act was observed, with the consequent great public inconvenience and expense incident to a re-trial of the cause. Any continuous course of conduct, such as the Court has himself observed, is so intolerable as to merit severe punishment in order that there may be no probable repetition thereof by this juror or by others upon whom the solemn obligation of a juror’s oath may rest so lightly.’

“The Court also said at the same time and in the same connection that he thought when leaving the court room on the night of July 27, 1925, that one year and one day in the penitentiary would be a very lenient sentence under the circumstances, and that he had his mind fully made up to fix a penitentiary sentence in punishment of the contempt; that the court did on the afternoon of July 28, 1925, announce that he would fix the punishment for juror Edmondson and defendant William Lloyd Lewis at sixty days in the city jail at Muskogee, Oklahoma, but before passing the sentence was advised that juror Edmondson’s wife was ill and reduced the sentence to a fine of five hundred dollars each against both the juror Edmondson

and defendant William Lloyd Lewis. That after the court had indicated that he would sentence the juror Edmondson and defendant William Lloyd Lewis to imprisonment in the city jail of Muskogee, Oklahoma, for sixty days each, the court refused to allow an appeal to the Circuit Court of Appeals and refused to allow time to prepare and file a bill of exceptions, and refused to allow time in which to prepare and file a transcript of the record, and refused to allow bail pending the appeal, and announced that there was no appeal allowable for a conviction for direct contempt, and that any relief from the Court's sentence would have to be had from the Circuit Court of Appeals.

"These defendants state that Judge Kennamer was extremely angry and incensed at the defendants, and himself said immediately before passing sentence in the contempt proceedings that he was very mad when he observed what he denominated a signal conversation between the juror Edmondson and defendant William Lloyd Lewis, and lost his patience right there and then; that the intense ill feeling of Judge Kennamer toward the defendants was evidenced also by his manner and conduct and facial appearance during the contempt proceedings, and these defendants state that they believe and therefore charge that Judge Kennamer's intense anger toward the defendant William Lloyd Lewis continues yet without abatement and has extended to and included defendant Allie E. Lewis, and that by reason of this intense anger Judge Kennamer is utterly unable to give the defendants or either of them a fair and impartial trial in this case. These defendants further state that they demeaned themselves properly throughout the trial of this case and gave the court no cause to charge either of them with misconduct or to charge the defendant

William Lloyd Lewis with engaging in a signal conversation with the juror Edmondson, and gave the court no cause to assess a fine of five hundred dollars against them for contempt of court, or to charge him with contempt of court; that on the trial of the contempt proceedings the juror Edmondson and defendant William Lloyd Lewis each testified that they were not signalling to each other at all, but that they only smiled at each other, and then it was merely in salutation, and without any ulterior motive and done innocently.

“The defendants further state that on the 16th day of July, 1925, Judge Kennamer called a special term of the United States District Court for the Eastern District of Oklahoma at Muskogee, Oklahoma, beginning July 20, 1925, for the purpose of trying this cause and certain other cases against these defendants; that said trial continued continuously from July 20, until July 28, 1925; that on the 28th day of July, 1925, the court discharged the jury in this cause and announced from the bench that neither this cause nor either of the other cases pending against these defendants would be tried immediately, and Mr. Dodds and Mr. Lee both in open court announced that the cases would be later set and the defendants given ample time to prepare for trial; that thereupon the defendant William Lloyd Lewis, believing said cases would not be reset until this fall, proceeded to Asheville, North Carolina, where his children are, one of whom is sick and afflicted with a severe case of asthma, and was in Asheville, North Carolina, on the 1st day of August, 1925, when the court, without the defendants’ consent and over their protest through their counsel of record, set this case and the other cases against these defendants for trial on the 10th day of August, 1925. The defendants’ counsel were

advised by Mr. Dodds by telephone on the afternoon of July 31, 1925, that he would move the court on August 1, 1925, at ten o'clock A. M., at Muskogee, to reset this case and the other cases against these defendants, but did not indicate what date he would ask for them to be reset; that defendants' counsel and defendant A. E. Lewis proceeded to Muskogee on the morning of August 1st, 1925, and appeared in court at ten o'clock; that Mr. Dodds asked in open court that all of these cases be assigned for trial on the 10th day of August, 1925; that defendants' counsel objected and protested against the setting of these cases at said time, but the court overruled his objections and protests and ordered the cases set for trial on August 10th, 1925, and ordered a jury of sixty men drawn from the jury box as a petit jury panel for the trial of said cases; that the defendant Allie E. Lewis and defendants' counsel R. L. Davidson were present at the drawing of said jury and immediately thereafter proceeded to the telegraph office and wired defendant William Lloyd Lewis at Ashville, North Carolina, to return immediately; that the said William Lloyd Lewis proceeded by the first train after receiving said telegram to return and reached Tulsa, Oklahoma, on Tuesday morning, August 4th, 1925; and that to-day, August 4th, 1925, is the earliest date possible upon which the defendants could make a file this affidavit.

"That shortly after the drawing of the panel of sixty names from the jury box on August 1, 1925, and without the presence of either of the defendants in court and without the presence of any of their counsel, the court of its own motion quashed said jury panel and ordered a panel of sixty jurors to be drawn from that part of the Eastern District of Oklahoma composed of the counties of Muskogee,

Okmulgee, Wagoner, Haskell, Cherokee, McIntosh, Coal, Atoka, Marshall, Choctaw, Adair, Sequoyah, Hughes, Pittsburg, Lattimer, LeFlore, Pontotoc, Johnson, Bryan, McCurtain and Pushmataha; that under said order nine counties of the present Eastern District of Oklahoma are excluded as well as the ten counties formerly belonging to the old Eastern District of Oklahoma, which are now a part of the Northern District of Oklahoma; that on the former trial of cause No. 8622 the court of its own motion quashed the first panel of forty names drawn and ordered the drawing of a second panel of forty names from the entire body of the present Eastern District of Oklahoma; that the court in its investigation and hearing of the contempt charges in case No. 8622, Judge Kennamer and the United States District Attorney questioned the jurors as to alleged statements made by juror Edmondson during the deliberations of the jury in regard to following the court's instructions, and Judge Kennamer instructed the jury in that case shortly before he censured juror Edmondson in the presence of the jury for the alleged smiling between the juror Edmondson and the defendant William Lloyd Lewis, that it was their duty to follow the instructions of the court, right or wrong; that if the court was wrong there were higher courts to correct him; that the proceedings in the contempt hearings in case No. 8622 and the attitude of Judge Kennamer in regard thereto and his statements from the bench will tend to destroy the independence of the individual juror's own convictions and will prevent the defendant from having a fair and impartial verdict of the jury.

“Defendants further state that juror Edmondson was not a member of the regular panel of jurors

drawn from the jury box; that when the regular panel of jurors drawn from the jury box was exhausted in selecting the jury in cause No. 8622, the court ordered the marshal to summon nine talesmen to report back in court within one hour; that the defendants objected and protested against completing the jury from talesmen and insisted that the additional jurors should be drawn from the jury box. The Government's attorneys objected to drawing the additional jurors from the jury box and insisted upon an open venire being issued for the additional nine prospective jurors; the defendants objected and excepted to the court's ruling in refusing to draw the additional jurors from the box and ordering them summoned as stated; that juror Edmondson was one of the nine talesmen so summoned from the City of Muskogee; that said nine talesmen reported in the court within an hour from the time the order was made; that the jury was completed on the same day the talesmen were summoned, and within a very short time after they had reported in court and the jury was under orders of the court kept together and placed in charge of two bailiffs, specially sworn for that purpose; that no one connected with the defense side of said cause ever communicated directly or indirectly in any way with juror Edmondson or juror Couch or with any other juror before they were accepted as jurors to try the case, or after.

"ALLIE E. LEWIS.

"WILLIAM LLOYD LEWIS."

[Jurat.]

3. *U. S. v. Lawson*, U. S. D. C., D. of Col. (unreported):

INDICTMENT.

“The Grand Jury Charges:

“Pursuant to Public Law No. 601, Section 121, of the 79th Congress (Ch. 753—2d Session), and house Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, the House of Representatives was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Public Law.

“John Howard Lawson, having been summoned as a witness by the authority of the House of Representatives of the United States to give testimony upon a matter under inquiry before the Committee on Un-American Activities of the said House of Representatives, and having appeared before the said Committee at its session within the District of Columbia on October 27, 1947, refused to answer a question put to him by the Committee, namely, whether or not he was or had ever been a member of the Communist Party, which question was a question pertinent to the question under inquiry.”

EXCERPTS FROM THE CHARGE TO THE JURY.

“The Court (Curran, J.):

“The Court instructs you as a matter of law that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress. Public Law 601 provides that the committee may act as a whole committee or a subcommittee.

* * * * *

“You will recall that the testimony tended to show that the committee was investigating the infiltration

of communism in the motion picture industry, and that the question propounded was whether or not the defendant was or had been a member of the Communist Party. For that reason the Court has determined that the question was pertinent to the inquiry; that it was a proper question for the committee to ask the defendant; and that it was the defendant's duty to answer."

"The defendant takes the position, through his counsel, in arguing the case to you, from the evidence submitted by the Government and the transcript of the case, that he was attempting to answer the question; and, two, that he did answer the question and that he was not guilty of a refusal. Now, the court has instructed you as to what the meaning of the word wilful in connection with this prosecution is; and so a person who declines to comply with the direction of the committee, on the basis of the claim that the committee is invalid or it is exceeding its jurisdiction, or that the request is unreasonable, or that it was outside the scope of the investigation, or that the committee was not investigating communism, in so refusing to answer a question acts at his own peril. The issue is clear in this case, ladies and gentlemen, and you are to decide it from the evidence as you have heard it from the witness stand.

"If you believe, and believe beyond a reasonable doubt, that the defendant appeared before the committee—and that is not controverted by the defense—that he was sworn—and that is not controverted—and that he was asked some questions—and that is not controverted—and that he refused to answer questions, it is your duty under the law to return a verdict of guilty.

* * * * *

“You will recall that the defendant was asked, ‘Are you now, or have you ever been a member of the Communist Party of the United States?’

“And he made a certain answer which he started by saying, ‘In framing my answer to that question I must emphasize the points that I have raised before.’

“The second question: ‘Mr. Lawson, the most pertinent question that we can ask is whether or not you have ever been a member of the Communist Party. Now, do you care to answer that question?’

“The defendant said: ‘You are using the old technique, which was used in Hitler Germany in order to create a scare here—’

“The third question: ‘Are you a member of the Communist Party, or have you ever been a member of the Communist Party?’

“To which Mr. Lawson replied: ‘It is unfortunate and tragic that I have to teach this committee the basic principals of American—’

“The fourth question: ‘That is not the question. That is not the question. The question is: Have you ever been a member of the Communist Party?’

“To which the defendant said: ‘I am framing my answer in the only way in which any American citizen can frame his answer to a question which absolutely invades his rights.’

“Now, in testing whether or not you believe from the evidence that the defendant answered the question propounded by the committee, you must decide for yourself whether or not the answers given by the defendant to the question satisfy you now as to whether or not he ever was or is a member of the Communist Party. If you can come to a conclusion by the replies the defendant gave to those questions—if you can answer by those replies—as to whether or

not he ever was or is now a member of the Communist Party, then, of course, it is your duty to return a verdict of not guilty. If you cannot, you must return a verdict of guilty.”

4. *U. S. v. Trumbo*, U. S. D. C., D. of Col. (unreported):

INDICTMENT.

“Pursuant to Public Law No. 601, Section 121, of the 79th Congress (Ch. 753—2d Session), and House Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, the House of Representatives was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Public Law.

“Dalton Trumbo, having been summoned as a witness by the authority of the House of Representatives of the United States to give testimony upon a matter under inquiry before the Committee on Un-American Activities of the said House of Representatives, and having appeared before the said Committee at its session within the District of Columbia on October 28, 1947, refused to answer a question put to him by the Committee, namely, whether or not he was a member of the Screen Writers Guild, which question was a question pertinent to the question under inquiry.
Second Count:

“The Grand Jury incorporates herein the first paragraph of Count One.

“Dalton Trumbo, having been summoned as a witness by the authority of the House of Representatives of the United States to give testimony upon a matter under inquiry before the Committee on Un-American Activities of the said House of Representatives, and

having appeared before the said Committee at its session within the District of Columbia on October 28, 1947, refused to answer a question put to him by the Committee, namely, whether or not he was or had ever been a member of the Communist Party, which question was a question pertinent to the question under inquiry."

EXCERPTS FROM THE CHARGE TO THE JURY.

"The Court (Pine, J.):

"I should say to you that Congress has power to conduct investigations, in order to secure information needed by Congress in connection with the enactment of legislation. Such investigations may be conducted by Congress through its committees or subcommittees.

"Pursuant to this Public Law 601 of the Seventy-ninth Congress, which is known as the Legislative Reorganization Act, and House Resolution 5, which has been received in evidence, Congress created the Committee on Un-American Activities, authorizing it as a whole or by subcommittee to make investigations of the extent, character, and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

* * * * *

"You will note that each count of the indictment alleges that the question was a question pertinent to the matter under inquiry. You will not concern yourself with this allegation, as it involves a matter of law which it is the Court's duty to determine and

which has been determined. I have determined as a matter of law that the committee had the right to ask these questions and that the defendant had the duty to answer these questions.”

* * * * *

“The record also discloses, as I recall it, that the defendant made certain statements after the questions involved in this case were asked. So you do not have a case of a witness who stands mute and makes no statement when a question is asked. However, a witness may refuse to answer a question, which is the charge in this case, by other means than by merely standing mute.

“An answer means a responsive reply; it does not mean any kind of reply that a person desires to give. So a witness may refuse to answer by making an unresponsive reply or statement when he does so not accidentally but intentionally, knowingly, with full understanding of the question, and after being given a reasonable opportunity to answer responsively. His motives, as distinguished from his intent, in making the statements may not be considered.

“So in determining whether the defendant refused to answer the questions which are here involved, you should consider what took place and what was said, as that has been read to you from the record, the clarity or lack of clarity of the questions asked, and defendant’s ability or lack of ability to understand the questions asked, the opportunity or lack of opportunity to answer responsively, having in mind that it is not necessary to ask a question over and over again after there has been a reasonable opportunity to answer responsively, and all the surrounding facts and circumstances; and from this all other pertinent evidence, determine whether this defendant refused to

answer either or both of the questions put to him, under the definition I have given you.

“I might state that the defendant had the right—I instruct you that the defendant had the right—to state and make known to the subcommittee any objections he might have to answering questions, but did not have the right to do more than to state and make known his objections. He did not have the right to insist upon any elaboration of his objections or repeatedly to state his objections instead of answering the questions.”

IV.

Specimens of Editorials Contained in Defendant's Exhibits “G” and “H.”

Texarkana, Ark., Gazette, Nov. 24, 1947:

TRAITORS IN THE FILMS.

Every member of the Communist party is an enemy of America. There is no doubt about that. And Communists in America are seeking to bring about the downfall of this country, just as they are seeking to bring about the downfall of a large number of countries in Europe.

The most recent and dangerous Communistic activity in this country was brought to light in the Thomas committee's probe of Un-American activities in the moving picture industry. The films form the most popular medium of amusement in America. Men, women and impressionable children see them. No greater appeal to human emotions and sensibilities can be imagined.

Filmland delighted the Communists as a soil admirably adapted to the spread of their doctrine. They have been at work for some time. Paul V. McNutt, an eminent attorney and political leader, has been retained apparently to assist Eric Johnston to cover Communistic propa-

ganda in the films. Wendell Willkie apparently was employed for the same purpose some years ago.

A great publicity campaign is being carried on by actors, actresses, screen writers, directors, Johnston and McNutt to delude the American people and to threaten the members of the Thomas committee and others, who are asking only a simple question: Are you a Communist? Evidently these people prefer a citation for contempt rather than to tell their true names and to answer whether or not they are Communists, points out George E. Sokolsky in his syndicated column.

An honest man does not hesitate to make public his correct name, address, religious, political and fraternal affiliations, and to do so under oath. The only ones who dare not take such an oath are those who fear the charge of perjury and its consequences. Therefore, it seems clear to us that those Hollywood people who howl freedom of thought and speech, but who refuse to answer honest questions before a committee representing the people of their country, are not honest American citizens and the implication is apparent that they are Communists or "fellow travelers."

The American people will welcome whatever facts can be brought to the surface, so that they may be safeguarded against the forces that wrecked and ruined country after country in Europe. If the Thomas committee proves that the movies have not been used corruptly, then that is to the credit of the motion picture industry. If it is proved otherwise, then the people should know and should know who the offending actors, directors, script writers and others in the film industry were or are. We do not have to declare war to catch traitors.

Bridgeport, Conn., Telegram, Oct. 30, 1947:

COMRADES IN HOLLYWOOD.

In this free country it is most difficult to understand why anyone in his right mind would want to be a communist. Communism thrives on spreading suffering and misery until free people, either through desperation or by force, accept the "fuller and richer life" promised by those who have never even tasted of a full or a rich life.

It is beyond our understanding why anyone should prefer hunger, cold, labor slavery, poverty, sickness and slow death—which is what the people get from their communist rulers—in preference to the full life and happiness of free America.

But, in this country, if a person wishes to be a communist, a believer in the morbid existence that communism offers, he may be one. He can speak or write about communism, can address public meetings or use the government mail service to spread his subversive doctrines. Native communists and imported ones like Eisler can hire halls and receive police protection during meetings even though they are obviously against the public interest.

In Washington the House Committee on un-American Activities is probing the extent of communist infiltration in Hollywood. It is merely trying to show the American people how far these comrades have wormed their way into the motion picture industry. The committee is doing nothing to infringe upon producers', writers' or actors' civil liberties, nor is it making anyone's personal beliefs a test of employment. The committee is making no attempt to abridge any of the "rights" of communists in this free land.

Despite all the noisy criticism of commies and their friends that the rights of a free press and speech and

radio are imperiled, that the Bill of Rights is being trampled upon, etc., etc., the Committee has clearly shown that there are scores of people in the so-called movie capital who seek to foist the "fuller and richer life" upon Americans by plugging the party line in films, and in a manner which they could not possibly do openly.

The finger is on them, and they know it. They have sneaked into jobs, key spots in the industry, and for all we know, may be taking orders direct from a foreign power. It is obvious from the start that they seek through the screen to influence the beliefs and the morals of the American people. Although they may not have been too successful, the public's interest and right to know what they are doing, is not lessened.

The Hollywood people have made a ridiculous defense, and the screaming of those who refused to admit their affiliation with the communist party, has caused great damage to the motion picture industry in this country. Even though reams of publicity are being created in Washington, which is supposed to be the life blood of the industry, it is not good publicity. It is the sort that undermines the faith of the people in a legitimate American activity.

Since it is no crime to be a communist, we can find at least a modicum of respect for one who is willing to stand up and be counted, but none, not even a grain of respect, for those who hide themselves under the cloak of respectability, yet carry on in secret the sabotage of decent Americanism.

Rockville, Conn., Rockville Leader, November 13, 1947:

THE HOLLYWOOD INVESTIGATION.

The investigation into Communist activities in Hollywood was on the whole hardly an edifying spectacle. Several facts have emerged however, which cannot be disputed: there are Communists connected with the motion picture industry; these Communists have attempted to inject the party line into pictures; to date these attempts have been thwarted by the industry itself.

Certainly it is difficult to imagine any place where Communist propaganda could do more harm than in motion pictures which are seen by millions of people of all ages. Educators are agreed on the value of visual aids in teaching, and the Communist party line, injected into films, would have an insidious effect. The fact that such propaganda has been kept out of pictures speaks well for the ability of the industry to police itself.

Whatever may be one's opinion as to the tactics employed by members of the investigating committee, and much could be said on this matter, anyone who believes in the American form of government cannot fail to be disgusted with those screen writers who refused to give a straightforward "yes" or "no" to the question as to whether or not they are or have been members of the Communist party. Any real American should be glad to answer with an emphatic "no". Refusal to do so has laid these individuals open to the suspicion that they actually are Communists. Had they answered "yes" one could have respected their willingness to stand up for their convictions while abhorring their beliefs.

The most sensible statement was made by Eric Johnston, spokesman for the motion picture industry. Mr. Johnston said that he would welcome an investigation of

Communism in the movies provided it followed court procedure where the accused had an opportunity to defend themselves against any irresponsible charges. He also expressed himself as being strongly opposed to government censorship. Until the industry shows that it is powerless to censor itself, most people will agree with Mr. Johnston. Political censorship can lead to as great evils as those which it censors.

Frankly, it seems a little ridiculous to hound Communists and still allow the Communist party to exist. J. Edgar Hoover, head of the FBI, has opposed outlawing the party on the grounds that such action would only drive the Communists underground where it would be more difficult to keep track of them. Mr. Hoover unquestionably knows more about the problem than most people, but it is a question that deserves serious consideration. It seems increasingly to be less a legitimate political party than a group which desires to overthrow the government by force and takes its orders from a power outside the United States. As such, it hardly seems to deserve a place on the ballot.

Columbus, Georgia, The Columbus Ledger :

WHAT IS THIS "FREEDOM"?

Those Hollywood people who seek to wrap themselves in the American flag in order to hide their Communist affiliations have a little of the appearance of trapped rats as they snarl and heckle the Congressional committee which is seeking to disclose "red" infiltrations.

Ordinarily, we believe we are as devoted to "civil liberty" as anybody. Ordinarily, we would agree with the contention that a man's political conscience is his own affair.

*But there are some men and women who do not—
and in the nature of their vocations cannot—lead*

“private” lives. Public office holders cannot claim total privacy of thought and action. Neither can those who write books or, for that matter, those who edit magazines or newspapers. And neither can those who make the nation’s motion pictures.

Such men and women sacrifice a good deal of their privacy simply because they have elected—and it is wholly a matter of their own free choice—to follow callings which have such an obvious impact in shaping public opinion that the masses of the people have special prerogatives when it comes to inquiring about their political beliefs.

The people, in a word, *have a right to know* what makes such men and women “tick.”

They have a right to ask whether they be Democrats, Republicans, Socialists or Communists—or whether they have any political belief at all. Otherwise they cannot judge with certainty what shapes the opinions and the philosophies which are daily being expounded.

In a very special sense, Hollywood scenarists are not entitled to complete privacy in their political lives, because they wield an extraordinarily potent weapon of propaganda, readily susceptible of *secret perversion*.

And this, indeed, is what is charged against the Hollywood writers! They are not alleged to have operated as Communist propaganda openly—as is done, for example, by *The Daily Worker*, the officially recognized organ of the Communist party in the USA.

They are charged, rather, with having operated the Communist propaganda surreptitiously—with “feeding” the Moscow “line” into films supposedly designed for entertainment only. And it is supremely

important for the American people to know if this charge is true or false.

We have, therefore, little patience for, and no sympathy with, those men and women who prepare the nation's movie scripts, but who won't say—when haled before the bar of public opinion—just where their political loyalties really lie.

If they are not Communists, they should not hesitate to say so, and they should not resent being asked.

If they are Communists, not only the public but the producers of motion pictures have a right to know it.

In all such matters, fair-minded people ought to ask themselves: "What is freedom, really?"

If we may give our own answer to that question, we would have to say that freedom is *not* the right to wrap oneself in the American flag whilst serving, surreptitiously, the policies and ideologies of a foreign power.

It is not the right to pollute the nation's intellectual stream—its books, its periodicals and its motion pictures—with any dangerous "ism" injected by subterfuge.

And it is not the right to refuse to answer honest questions honestly.

As regards Communism, it is no longer possible to view it as simply another political party, operating sincerely within the free American political system. It must now be viewed, rather, as a formidable international conspiracy, managed from abroad and with the avowed objective of destroying the American idea.

Thus any legally-constituted Committee of Congress has a right and duty to inquire of any man in public life (and Hollywood scenarists *are in* public life) whether

they be Communists. Such inquiries have, unhappily, become necessary in order to protect the national security, and if they represent the beginnings of American "concentration camps"—so be it.

Maybe, indeed, that is where we ought to put all the Communists, and let them stay there until they rot.

Decatur, Ill., Review, Nov. 22, 1947:

HURT FILM INDUSTRY.

Hollywood is alive to the fact that the ten men connected with the motion picture industry who refused to answer questions before the House un-American activities committee have cast a shadow over the industry. Eric Johnston, president of the Motion Picture Association of America, says they did "a tremendous disservice."

Citation of the ten men for contempt has been approved by the full committee of the House and the House probably will pass on the charge next week. The men refused to answer on constitutional grounds which may be their right, but in refusing to answer the general public did not follow the technical point made, which must be determined by a court, but read only that the men refused to say where they stood.

In this country a man is considered innocent until he is proven guilty but when he refuses to answer questions the public jumps to the conclusion that he has something to hide. Refusal to talk added to the fire of suspicion that perhaps there is something wrong in Hollywood.

The film industry denies the charges hurled at it by the House committee but the refusal of the ten men to talk has not helped the industry defense and it is not likely that the industry will come to the defense of the ten men who Mr. Johnston says "have done a tremendous dis-

service to the industry which has given them so much in material rewards and an opportunity to exercise their talents.”

New Orleans, La., States, Nov. 28, 1947:

HOLLYWOOD DECISION.

To sever a worker from his bread and butter under circumstances that might make it difficult for him to make another suitable connection is not a matter to be passed off lightly. Hollywood movie executives must have sensed this when they held a two-day closed meeting to decide the fate of 10 figures cited for contempt of Congress. It was not easy, obviously, to reach a decision.

But the film writers implicated brought their predicament upon themselves. They insisted on keeping secret the matter of their membership or party-line affiliation with the Communist party. Mere membership in the Communist party is less repulsive to the American public, we are inclined to believe, than the snakiness of Commy methods and activities. Our people want all political activities conducted opening and above board. This is the traditional American way. Any other system, is Ku Kluxism and when that erupted a few years ago, public sentiment and public action put a foot down promptly and impressively.

It is snaky and contemptible and base to be secretly a member of the Communist party, then pretend not to be or to be something else. It is plain political treachery. It is thumbing the nose at American ideals and traditions. Let the Commies do as other political groups do—openly and honestly proclaim their affiliations, alliances, doctrines, objectives and loyalties. Then public opinion could deal with them—in the American way.

Lewiston, Me., Sun, Oct. 28, 1947:

NO CAUSE FOR EVASION.

The House Un-American Activities Committee probe of Hollywood for possible subversive activity gains more and more attention as it goes along. After several days testimony last week by "friendly" witnesses—those willing to make allegations of Communist activity in the movie colony—the committee ran into opposition yesterday.

In a turbulent forenoon session, a screen writer, John Howard Lawson, was put on the stand. Evidence was given to the effect that he had held a Communist party card several years ago. Then he was asked the plain question whether he is, or ever was, a Communist. He refused to answer, and the committee voted to cite him for contempt of Congress.

Lawson claimed that the committee had no right to question anyone as to their political beliefs. But the courts have frequently held that these congressional committees have very wide powers, as some of the nation's big financiers found out 11 or 12 years ago when Wall Street was the target. What we have cautioned against more than once is the misuse of congressional investigatory powers, and the committee will earn more confidence from American citizens, if it discards all hearsay evidence and sticks to proven facts.

* * *

Getting back to Lawson's refusal to answer, we think he should have replied to the committee's question. If he is not a Communist, and never was one, there is no reason why he could not have answered in the negative. If he is a Communist, or has belonged to the party, that is admittedly an unpopular admission to make at this time.

But we have quite a few people in this country who are enough different from their fellows as to be conspicuous in their beliefs or their way of life. Some think nudism is all right, and they are frequently made fun of as a result. Some hold to odd religious beliefs, others are vegetarians and firmly refused to eat meat. The price they all pay for non-conformity is a degree of public notoriety, and those who are sincere must put up with it.

Perhaps we can put Communists in this class, and leaving aside the question of whether or not they are working for violent overthrow of the government, their membership in the party inevitably singles them out. There is no law against being a Communist here, any more than there is against being a vegetarian or a sun-worshipper. But the very fact of refusing to admit or deny it, before a congressional committee, multiplies public suspicion. They should answer yes or no, and if in the affirmative, follow up by asking the Congressmen what they are going to do about it. Because there just isn't anything Congress can do.

Haverhill, Mass., The Haverhill Gazette, Oct. 30, 1947:

BEYOND COMPREHENSION.

Why an American should refuse to put his political affiliation officially on record is something quite beyond our comprehension.

Such refusal, however, has become common since agencies of government began to search out Communist influence in American life.

Some trade union leaders have chosen to be insulted by the idea anybody should ask whether they are Communists.

Now we have Hollywood personalities refusing to answer a congressional committee's questions as to their political affiliations.

Communism is an aggressive force obviously striving to destroy every American institution and to level every American standard.

This is a proposition that needs no more demonstration than the proposition that a thief in the house is a bad man to have around.

Obviously, therefore, the government that tries to root Communism out of the life of the country is acting with the wisdom of the householder who calls the police when he suspects the presence of a thief.

When an agency of government turned toward Hollywood in its search for Communism, it acted wisely.

Motion pictures are perhaps the most powerful propaganda force in the world. If no Communist agents had got into the movie industry, it would be a strange situation indeed.

The congressional committee had impressive evidence from important figures in the industry, that Communists are doing their evil work in Hollywood. The committee logically followed this evidence with subpoenas to some of the suspected persons.

One suspected person after another refused to answer the committee's question on the ground that asking their political affiliation was an improper invasion of their privacy.

This is a flimsy refuge from an accusing force.

In the minds of the people, we think, these screen persons, by their refusal to co-operate with the committee perhaps unjustly, have condemned themselves.

Detroit, Mich. Detroit Free-Press, Oct. 28, 1947:

MOST UN-AMERICAN OF ALL
THE COMMITTEE.

The most un-American activity in the United States today is the conduct of the Congressional Committee on Un-American Activities.

It is so viciously flagrant a violation of every element of common decency usually associated with human liberty that it is foul mockery on all that Jefferson and Lincoln made articulate in their dreams of a cleaner and finer order on earth.

The hypocritically named "committee on Un-American Activities" should be abolished at the earliest possible moment by the United States Congress and so deeply buried that no other group of publicity-mad zealots could ever again be allowed to tarnish with their stench the greatest institution of our democracy, our halls of legislation.

This Committee is possessed by a denial of human freedom generally associated with the Directorate in the French Reign of Terror, with the Soviet mass slaughter trials, and the Hitlerian blood purges.

No wonder that Stalin, Molotov, Vishinsky and others of that breed [sentence missing] good names for the sheer sadistic glee of getting headlines should be allowed to exist.

*

This newspaper has no defense to make of many of the rotten conditions that exist in Hollywood. But we do applaud the courage of the motion picture actors and actresses and the others who work in the films for fighting

against this latest outrage on the part of the fanatical witch hunters.

Paul V. McNutt, their counsel, has demanded that the Committee furnish proof of its blanket accusations of Communism against the industry.

This is an astounding development for these Congressionally protected slanderers.

"Look," they must say in amazement, "our victims are asking us to produce evidence of our charges! How absurd! We never prove our accusations. Our job is merely to smear."

The greatest single weapon within the power of our Government is the power of inquiry so that democracy shall always be cleansed before the eyes of the sovereign people. So vital is it that it should forever be safeguarded as sacred and held inviolate.

But the "Un-American Committee" has prostituted that great function and has dragged down with it to the gutters our great Palladium of human liberty.

Let Congress abolish this smear gang.

Such inquisitions belong to the dark ages of the New Deal.

Grand Rapids, Mich. Grand Rapids Press, Dec. 1, 1947:

RED CLOUD OVER HOLLYWOOD.

The motion picture industry, obviously gravely concerned over the bad publicity it has been receiving lately as the result of the congressional inquiry on Communism, has fired the 10 employes cited for contempt by the Thomas committee and barred Communists from its pay rolls.

While some may contend that the industry was unduly hasty in dismissing the accused before anything actually had been proved against them, it isn't easy to defend the 10 men, since they did little or nothing to defend themselves against the committee's charges and allegations. And even those persons who have been most critical of the committee's methods, or who have insisted that even a congressional committee has no right to pry into a man's political affairs, will find it difficult to blame the picture people for being jittery. They are in the business of selling a mass-communication product and, if they hope to stay in business, they must be unusually sensitive to the currents of public opinion.

There can be no doubt that the American people are concerned over possible Communist activities in their country and are likely to be suspicious of any industry charged with harboring Reds in influential positions. The case against the accused is not based on any claim that they succeeded in getting Communistic propaganda into their finished product—for they obviously didn't succeed in doing that—but is based on the belief that the nation can't be too careful in protecting itself against such a possibility.

The whole incident is particularly unfortunate because some of the men cited worked on some of the finest films of the last few years. But as a group they haven't done much to encourage sympathy for their cause. On the stand they put on a show with a script which sounded as if it had been written by Red propagandists, and in denouncing their dismissal they handed out some more of the same with the charge that their firing was only part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-Semitic, anti-Negro and war-inciting doctrine." Do they

expect the American people to believe that ridiculous charge or to accept it as proof of their loyalty to democratic principles?

Nesoho Mo., Democrat, Nov. 26, 1947:

FUEL FOR HYSTERIA.

President Eric Johnston of the Motion Picture Association of America indicted 10 film writers and directors who refused to answer questions of the House Committee on Un-American Activities. He declared these men did a "tremendous disservice" to the industry. He thinks they should have stood up and been counted "for whatever they are." Mr. Johnston is perfectly right.

An array of circumstantial evidence was lodged against each of the 10. Refusal to answer the committee's question, "Are you a Communist?" left a smudge against the industry. Perhaps some were imbued with the esoteric conviction no one has the right to delve into Communist activity in the United States. The public conviction certainly is that these men balked at the query because they had something to conceal.

It is encouraging to find Mr. Johnston lashing out at such conduct and declaring again that Holloywood has no place for subversives. Perhaps, as he asserts, they fed the fires of hysteria and added to confusion. But the confusion is probably within the industry which doesn't know just what to do with them.

If these 10, or any of them, are Communists they had little alternative. They were forced to button up their testimony, face charges of perjury or by admitting Communist affiliation divorce themselves from cushy film jobs.

St. Louis, Mo., Post Dispatch, Oct. 30, 1947:

THEY WOULDN'T SAY "YES" OR "NO."

Apparently, J. Parnell Thomas is having some success in identifying Hollywood figures as Communists. Ten writers, producers and directors have been cited for contempt for refusing to give a "yes" or "no" answer to the question: "Are you a Communist?" Acting obviously under advice of counsel, the 10 men declined to answer on the ground that it is an improper question, or that they are protected by the Constitution from inquiry into their political beliefs.

It strikes us that the question is quite proper, and we know of nothing in the Constitution that is apropos. Surely, the witnesses cannot refer to that clause of the Constitution which protects a person from self-incrimination. If that clause, indeed, is the one they are invoking, it is an admission by the witnesses that they regard membership in the Communist party as a violation of penal law. That would be playing right into the hands of the committee, which is seeking, in fact, to outlaw the Communist party.

While the performance of the House Un-American Activities has fallen far short of ordinary standards of congressional dignity and has smacked of cheap melodrama, the behavior of the eight men cited for contempt is equally bad. If they are Communists—and the committee has introduced evidence to that effect—their refusal to admit it leaves a very bad taste in the mouth.

Usually men who belong to belligerent minorities or who espouse unpopular causes are happy and proud to make open avowals. These men are not in that mold. Instead, they hide themselves behind the Constitution

of the United States, the very document that Communism would destroy if it had the chance. It is a strange and depressing spectacle.

Newark Star-Ledger, Nov. 27, 1947:

HOLLYWOOD GETS WISE.

The executives of the movie industry, meeting in New York, have decided to suspend immediately and without salary the 10 Hollywood personalities who have been cited for contempt of court by the House Committee on Un-American Activities. The film executives have also decided to discharge all Communists and to refuse to employ Communists, while at the same time taking care to guard against hasty and mistaken judgments of suspected persons.

This action by the film executives is to be applauded, although it is rather belated. More impressive would have been action by the industry immediately, when these 10 Hollywood personalities refused to state whether or not they were Communists.

The Communists and their misguided apologists have succeeded in distorting the issue, contending that the civil rights of the accused persons are at stake. This is a clever bit of obfuscation, since it is the civil rights of all the people that are at stake in the continuing conspiracy of the Communists to destroy our way of life.

The basic issue in the struggle over communism is civil rights. It is decidedly untrue that the basic issue is one of economic or social reform. The Communists contend, in practice as well as in theory, that they cannot carry out their program without establishing a dictatorial government and suppressing the freedoms of those to communism.

Those who believe in civil rights thus have the duty of eliminating Communists from positions where they weaken our democratic processes and poison our intellectual food at its source. Their right to expel Communists from positions of influence should be qualified only by painstaking regard for justice in considering borderline and disputed instances.

The 10 Hollywood personalities involved in the contempt citations do not admit they are Communists, and some of them may not be. That is not quite the issue. Their refusal to assert under oath that they are not Communists makes them undeserving of positions of influence and power, and dangerous to the cause of civil rights.

The film industry has at last been aroused to its responsibility in protecting itself and the country against the Communist enemies of civil rights. The principle it has at last recognized—that enemies of civil rights should not be sheltered or tolerated in position of trust and influence—should be extended throughout the fabric of industry, business, politics and government.

Patterson, N. J., News, Dec. 3, 1947:

AN UNWISE AND DISASTROUS WEAKENING OF THE
DEMOCRATIC PROCESS.

Every loyal American will emphatically agree with Eric Johnston of the Motion Picture Association that the ten movie industry employes who refused to tell the House Un-American Activities Committee whether or not they were Communists have "done a tremendous disservice to the industry" and "hurt" the cause of democracy immeasurably.

Even those who were appalled by the committee's conduct of some phases of its recent hearings can find scant

justification for the attitude of witnesses who contemptuously refused either to admit or deny membership in the Communist Party. The Bill of Rights guarantees every American broad freedom to think and speak as he pleases, but it guarantees him no right to wear false colors or to cloak his propagandist efforts in secrecy.

The issue raised by the Hollywood investigation in this respect could not be more cogently or thoughtfully presented than in the recent report of the President's Committee on Civil Rights. No one would question the sincerity of this committee's regard for civil liberties, yet it urges, for the express purpose of "strengthening the right to freedom of conscience," that legislation be enacted to require "all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves through systematic registration procedures."

"One of the things which totalitarians of both left and right have in common," the committee observes, "is a reluctance to come before the people honestly and say who they are, what they work for and who supports them . . . We do not believe in a definition of civil rights which includes freedom to avoid all responsibility for one's opinions. This would be an unwise and disastrous weakening of the democratic process. If these people wish to influence the public . . . they should be free to do so. But the public must be able to evaluate these views."

In urging the registration of all opinion-swaying groups the Civil Rights Committee makes it plain that "our purpose is not to constrict anyone's freedom to speak; it is rather to enable the people better to judge the true motives of those who try to sway them." The "principle of disclosure," in short, is "the appropriate way to deal with those who would subvert our democracy." And that:

all ballyhoo and indiscretions aside—is precisely the principle which the House Un-American Activities Committee was created to serve, and did in fact serve with its Hollywood hearings.

Buffalo, N. Y., News, Oct. 31, 1947:

HOLLYWOOD DEFIANT.

In its investigation of Communism, the House Un-American Activities Committee laid itself open to criticism for entering hearsay testimony in the public record. This procedure was condemned as violating the spirit of the Bill of Rights.

But the committee cannot be criticized for putting to Hollywood writers and others appearing before it the question whether or not they are or have been Communists. This is a legitimate question; it is entirely consistent with the purpose for which the committee was created—to determine the extent and character of un-American activities and the spread of anti-American propaganda within the United States.

Certain of the Hollywood screen writers insolently refused to answer the question; and they very properly were held in contempt by the committee. In announcing the conclusion of the “first phase” of the investigation, Chairman J. Parnell Thomas did not indicate whether the committee was closing the book on Hollywood. The strange part of it was that Eric Johnston, president of the Motion Picture Association of America, should have given countenance to the recalcitrant screen writers by charging that the committee was using unfair methods in relation to them, such as would create “a damaging impression of Hollywood.”

This is plain hogwash. It is the defiant and arrogant screen writers who are creating a damaging impression. By their attitude they inferentially lend support to previous testimony that Communists have infiltrated into the industry—whether or not they themselves are Communists. Obviously, those who are Communists have been intent on insinuating Moscow propaganda into the movies. All such are missionaries of that faith; this is a condition of party acceptance. All Communists are un-American—enemies of the American way of life.

The Government has a right to know who in the motion picture industry are Communists, just as it has the right to know who among the labor leaders are of that faith. In short, it has the right to protect itself against their designs. They hold themselves subject to the dictates of a foreign power, a power which is waging a "cold war" against the United States. In the circumstances, a thoroughgoing American could hardly feel that he had good reason to refuse an answer to the question: Are you a Communist?

New York Herald Tribune, Oct. 22, 1947:

HOLLYWOOD IN WASHINGTON.

The first two days of testimony upon Communism in Hollywood before the House un-American Activities Committee have produced exactly what was expected of them: an abundance of unsubstantiated charges, some dizzying new definitions of Communism and a satisfactory collection of clippings for Mr. J. Parnell Thomas's scrapbook. A good many citizens of Hollywood have been called Communists, to the evident delight of Mr. Thomas and his witnesses. One man has already been thrown bodily from the hearing room, and Mr. Bartley Crum escaped the same

fate only because he was able to swallow his sense of indignity just before Mr. Thomas struck.

There are, without doubt, circumstances under which such an investigation as this one would be proper. If the moving pictures were undermining the American form of government and menacing it by their content, it might become the duty of Congress to ferret out the responsible persons. But clearly this is not the case—not even the committee's own witnesses are willing to make so fantastic a charge. And since no such danger exists, the beliefs of men and women who write for the screen are, like the beliefs of any ordinary men and women, nobody's business but their own, as the Bill of Rights mentions. Neither Mr. Thomas nor the Congress in which he sits is empowered to dictate what Americans shall think.

Some attempt was made to show that Communism was being permitted to creep into films, but in each case the attempt dissolved into the ludicrous. Mr. John Moffit, for example, cited as an example of the party line a scene in which a banker is portrayed as an unsympathetic man—a typical Hollywood stereotype that has been written into moving pictures since long before any Communist menace was noticed on the west coast. Mr. Moffit also firmly assured the committee that forty-four of a hundred Broadway plays constituted Communist propaganda, without mentioning how the fact has so far escape the notice of Broadway.

No doubt the revue is still only in its preliminary scenes, and Mr. Thomas has a good many more acts to trot out before he rings down the curtain. To date he has brought forth nothing to make the whole affair seem anything more than an attempt to seek personal aggrandizement on the taxpayer's funds. Not Hollywood but Congress is being

investigated here, and once again the testimony indicates that the system of Congressional investigating committees needs overhauling. The entire process, in which a committee chairman is allowed unlimited freedom and his targets must remain simply targets, is inherently offensive and should be changed to bring some degree of equity into the proceedings.

New York Herald Tribune, Nov. 27, 1947:

COMMUNISM AND HOLLYWOOD.

It is doubtful whether any one, with the exception of Mr. J. Parnell Thomas, will feel happy over the action of the motion-picture industry in firing the ten persons cited for contempt of the Thomas committee and in henceforth barring Communists from the industry's pay rolls. The industry's own unhappiness is evident enough from the tortured language of the announcement, in which respect for justice and civil liberty struggles both painfully and obviously with the desire to escape the embarrassments brought down by Mr. Thomas's hippodrome.

Many will observe that the motion-picture business seems to have got along very well in the past utilizing the services of the evasive ten without discovering Communist propaganda turning up in its products. Many will feel that it is simply a case of a gigantic industry, always notoriously timid and sensitive to any kind of mass reaction, running to cover from popular hysteria, at the expense of destroying the livelihoods of a few writers and directors against whom nothing has been proved except that they evaded answering as to their political beliefs. It is neither a heroic nor an inspiring attitude. But is it inadmissible?

One cannot blink the fact that this is another of the difficult questions forced upon us by Communism, by its nature, its aims and, in particular, its methods. Communist secrecy and infiltration are facts, and it is difficult to argue that an industry of mass communications is denied by democratic principles the right of protecting itself against them. The ten put on a show before the Un-American Activities Committee which was damaging to the industry. Now they have issued from Hollywood an answering blast, denouncing their dismissal not merely as an invasion of their liberties but as part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-Semitic, anti-Negro and war-inciting doctrines."

Here is a piece of politically inspired propagandist nonsense of a kind which Hollywood certainly cannot be required to protect or encourage. It is hard to maintain that a mass-communication industry is powerless to deny employment on suspicion of secret membership in a subversive organization. This newspaper believes the power must be conceded; but it certainly should be used as sparingly as possible, and one trusts that the motion-picture industry's insistence on fairness and moderation will be observed.

The Raleigh Times, N. C., Nov. 1, 1947:

WHAT HAVE REDS GOT THAT OTHERS HAVEN'T?

The Communist Party advocates forceful overthrow of the United States Government, yet it sometimes seems that officials bend over backward to be nice to Communists.

Pin a Red label on someone, and he often can "get away with murder." He can get away with a lot of things

which would land a run-of-the-mine loyal American citizen in serious trouble. For, once a Commie is put on the spot all the good brethren put a halo of martyrdom about his marxist head and shed maudlin tears about his "civil rights" and "liberalism." And it is a Communist tradition to yell bloody murder about the Constitution and the Bill of Rights which the Communist Party seeks to destroy.

A disgusting spectacle has just closed in Washington. There, a dozen or so screen writers have been asked the simple question of whether or not they are, or have been affiliated with the Communist Party. To this question they have shrieked defiance at the House Committee on Un-American Activities, a quasi-judicial body, and hurled insults at its members.

In sum, these people consider themselves above the law. Their attitude not only insults the Un-American Activities Committee, but it insults every law-abiding American citizen as well.

If a plain, garden variety of American were to act as these fellows have acted, he would have landed in the well known hoosegow in short order. These recalcitrant witnesses have been cited for contempt. If they are not prosecuted vigorously, then the authorities responsible for their prosecution should hang their heads in shame.

And if the big moguls of the motion picture industry permit them to continue writing for the films their actions can be construed as a slap in the face of the law abiding public which supports them.

Ashtabula, O., Star Beacon, Nov. 6, 1947:

THE '\$64 QUESTION.'

Several subpoenaed witnesses appearing before the House un-American Activities Committee in Washington refused to answer what has been called the "\$64 question." This question is "are you now or have you ever been a member of the Communist Party?"

Motion picture writers stood on what they called their constitutional rights and declined to say yes or no. They face court action on charges of contempt as a result of their obstinate refusal to admit or deny they are or have been Communists.

These screen writers, who may have been advised by their attorney not to answer the question, do not make a good impression on public opinion by taking this attitude. For while it is quite possible for one who is not and has not been a Communist to refuse to answer this question, it is suspected that most persons who do not belong to and never have been members of this subversive so called party would reply to the query without quibbling over constitutional rights.

If someone who disapproved the committee, or its methods, or its personnel, or everything connected with it and wished to plague and annoy and embarrass it, he might decline to answer although not a Communist.

However, the impression the public will get from the refusal of these men to say whether or not they are or have been Communists is that they may have something to conceal. They make themselves suspect by declining to answer. The committee might call for—if it hasn't done so already—the F. B. I. files made during the war as it checked on Communists in this nation.

Toledo, O., Blade, Nov. 11, 1947:

ON QUESTIONS AND ANSWERS.

When we said sometime ago that we did not like the way the House Committee on Un-American Activities goes about smearing witnesses in its inquisitorial hearings, we did not mean that we liked the way some of those Hollywood chaps raved and ranted when they took the witness stand.

Americans standing on their traditional rights as free men in a democratic country don't have to spout forth gibberish. If they are asked questions about their private affairs or political opinions which no one has a right to ask, they can reply bluntly, "It's none of your business" or, if they prefer, "It's none of your blankety-blank business." If they are even asked questions about crimes which they have committed, they can refuse to answer on the grounds that they cannot be required to give incriminating evidence.

But though a free man in a democratic country is not required to answer the questions of police investigating a crime, it is hard to understand why an innocent man would refuse to do so. And it is equally difficult to understand why a good citizen would refuse to give pertinent information to any duly constituted government body. Just as a law-abiding citizen will want the law enforced, so will a tax-paying citizen want to see government funds wisely spent and carefully checked.

For these reasons, we are glad that the revival of the Hughes inquiry before the Senate War Investigating subcommittee has taken, so far, a saner turn. The committee shouldn't set out to smear the reputation of any citizen. Any citizen should be glad to supply the com-

mittee with any information pertinent to its investigation. Only on that basis can all of us continue to enjoy those democratic rights which impose democratic obligations.

Chattanooga, Tenn. Chattanooga News-Free Press:

ONLY ONE VERDICT POSSIBLE.

If a man on trial in a court of law hears positive evidence given against him and fails to deny his guilt or to present any other defense, the jury has no choice but to conclude that he is guilty.

Of course the Hollywood characters who have been called before the House Un-American Activities Committee in its investigation of Communist infiltration into the movie colony are not on trial for any crimes or misdemeanors. But they have been summoned by a committee of the Congress of the United States, which has full legal powers to summon and to question them, in pursuance of its efforts to find out to what extent the Communists have succeeded in gaining a foothold in the moving picture business for the purpose of using the movies for the dissemination of their poisonous attacks on American life and American institutions.

Critics of the Hollywood Red probe have seized upon the inevitable pieces of trivia that have turned up in the evidence and have emphasized these in their efforts to discredit the investigation.

The evidence against the Hollywood writers who have refused to tell the committee whether or not they are Communists, however, is not trivial. The committee has heard positive testimony that they are Communists and detailed testimony on how some of them worked to carry out the Communist propaganda scheme in Hollywood.

Communist party membership cards identified as those of the accused men have gone into the record.

To date four of the Hollywood figures accused of being Communists have refused to answer this question—John Howard Lawson, who, it has been testified, was the Red “commissor” in Hollywood and instructed Communist writers to get “five minutes of the party line” in every picture; Dalton Trumbo, Albert Maltz and Alvah Bessie.

They have been cited for contempt of the committee and the charges should be pressed with the utmost vigor—against them and against all others who may adopt their tactics. They are not only technically in contempt for their refusal to answer questions; their conduct before the committee has been contemptuous in the extreme.

These men have been denounced as Communists by reliable witnesses. If they persist in their refusal to either confirm or deny the charges, the jury will have no choice in arriving at a verdict. The verdict will have to be one of guilt. The jury in this case is the people of the United States.

Greenville (Texas) Evening Banner, Oct. 30, 1947:

STRANGE DEFIANCE.

An American who is not affiliated with the Communist Party and does not sympathize with its theories in any particular, should not be ashamed to declare publicly that he is not a Communist. Some of the Hollywood big-wags, however, are not saying “yea” nor “nay” to the question “Are you a Communist?” propounded at the House un-American Activities subcommittee hearing in Washington.

So far ten so-called “prominent” personages of Hollywood have defied the committee and have been cited for

contempt. It is probable that more will be cited before the hearing is ended.

It is the contention of the witnesses that the committee has no right to ask questions about political beliefs. Perhaps not, but regardless of the rights of the committee in regard to this particular question, a non-Communist should not hesitate to say that he is not a Communist, especially when he is a witness in a public hearing of national importance. It would be simple to say "no," but if he says nothing he gives both the committee and the public reason to wonder.

Houston, Texas, Post, Oct. 28, 1947:

RED FILM PURGE.

The dismissal by R-K-O studios of a producer and a director, two of the 10 film characters cited for contempt of the House investigating committee, is good as far as it goes. But the movie industry will not have gone far enough to satisfy public opinion until it fires the other eight men who arrogantly refused to tell the committee whether or not they were Communists.

In fact, the publicity of the investigation has alerted the American people to Red-slanted film propaganda, and henceforth more of them will spot the poison despite its sugar-coating in sweet emotional appeal.

Although the investigators of un-American activities did not probe deeply into the extent of left-wing penetration in the business of making movies, it brought the public a few facts about some of the people who write, direct and produce the film plays, and how they work. And if the industry itself now does not purge the pictures of such fouling, there may be a popular uprising next time.

Producer Adrian Scott's public comment on his discharge is typical of the attitude taken by all Reds, from Molotov on down. He calls the committee's contempt citation a "perversion of justice," and brands it as a "temporary triumph of John Rankin of Mississippi." But more than 300 House members voted to uphold the committee's action and less than a score voted against it.

Mr. Scott and his nine colleagues claimed the right to refuse to divulge their political affiliations under the guarantee of free speech. But Congress has taken the position, and the people will endorse it, that if scenario writers, directors and producers have the right to color their films Red, the public has a right to know who is doing the coloring.

Petersburg, Va., Progress-Index, Nov. 26, 1947:

ON THE WAY TO AN ANSWER.

By large majorities the House of Representatives voted contempt citations against ten motion picture writers and directors who refused to tell the un-American activities committee whether they were Communists. The matter now is in the hands of the Justice Department which promises prompt prosecution, with grand jury action coming possibly within a week. While the action of the House in support of its committee is a setback for the view that a person cannot be required to answer the question of Communist affiliation, this does not settle the issue, for it remains to be seen what the courts will do with it.

It does not follow that all or any of the ten are Communists, for though they may have been attempting to hide the fact of party membership they could have refused to answer because they felt their civil liberties were in

volved. If the un-American committee had conducted its affairs in a more acceptable fashion, relying only upon real evidence and allowing accused persons every opportunity to clear themselves, perhaps we would have been spared some of these performances, but the shortcomings of the investigating committee, serious as they are, do not justify refusal to answer yes or no to the question of Communist affiliation. In the prevailing atmosphere those who take that course need not be surprised to find themselves under greater suspicion than ever.

While the issue goes to the courts there are signs the motion picture industry is doing some housecleaning of its own, which is as it should have been all along. Hollywood's red menace can be sized up by saying it is by no means as great as the hysterical ones would have us believe but has real potential seriousness in that Communists with the usual determination and more than the usual supply of funds have occupied some key positions. An industry which has policed itself in other respects ought to be able to take care of this one, but evidently outside pressure was needed to bring it to the point of doing so.

No. 12,222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED,

Appellant (Defendant),

vs.

LESTER COLE,

Appellee (Plaintiff).

APPELLEE'S BRIEF.

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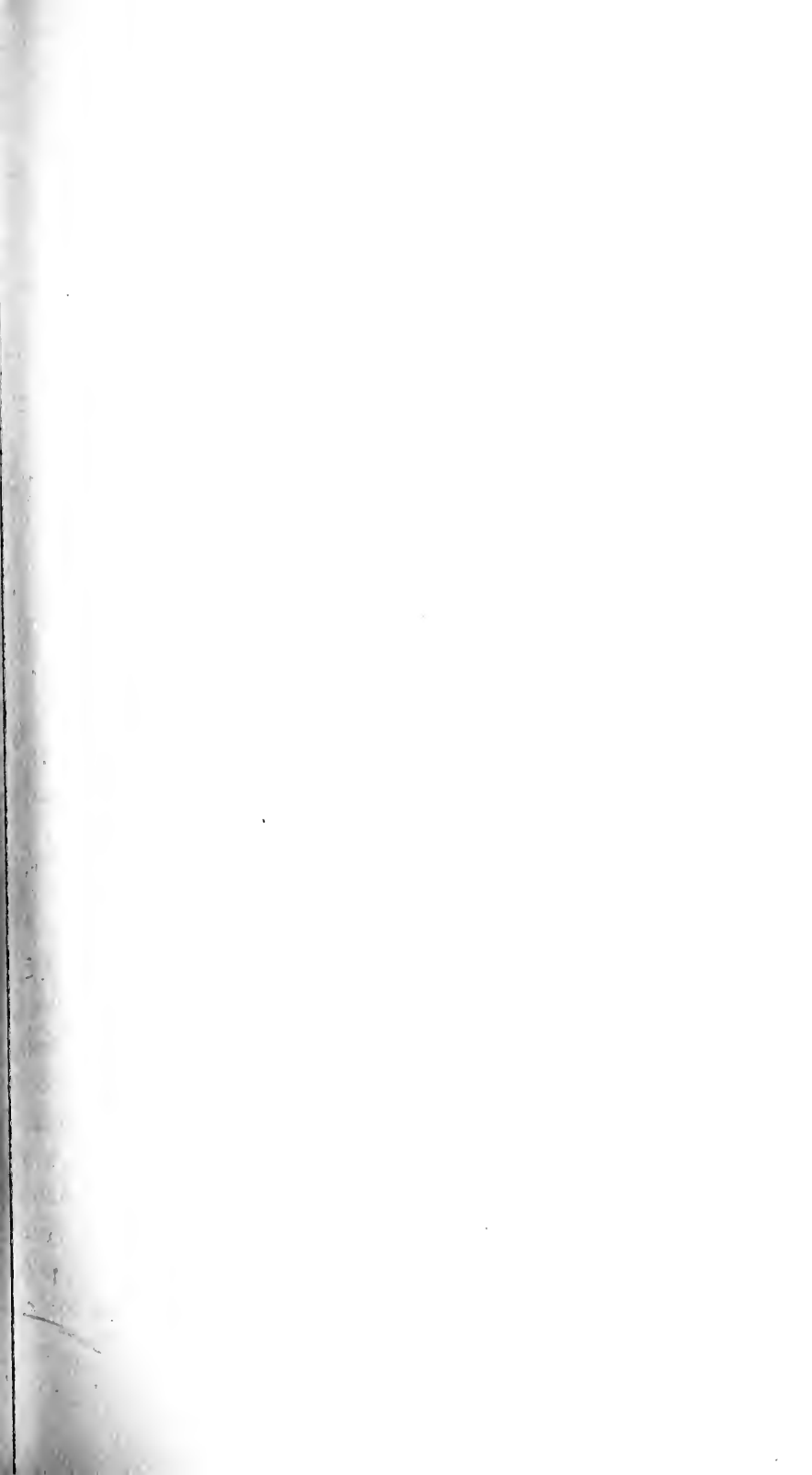
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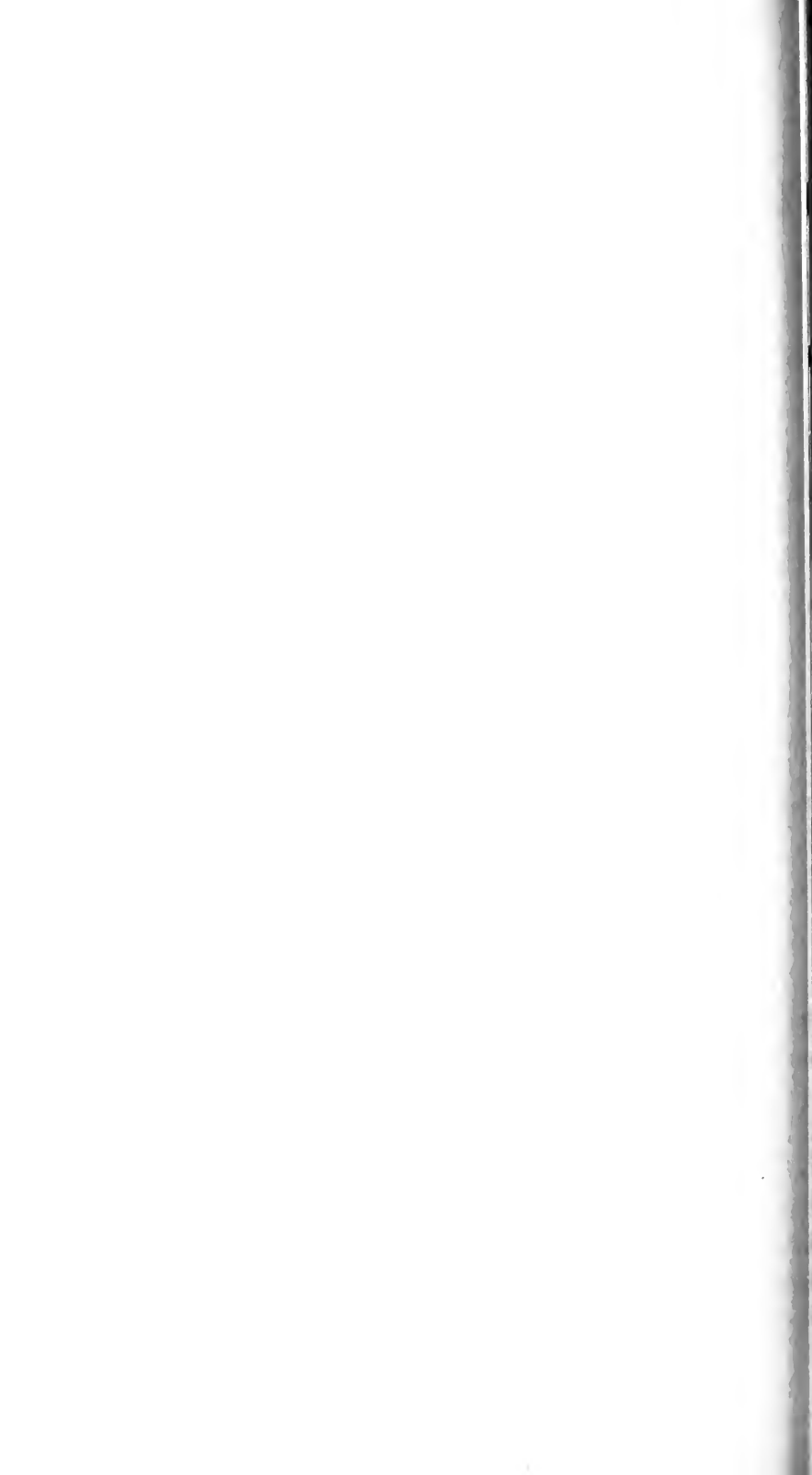
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No. 12,222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED,

Appellant (Defendant),

vs.

LESTER COLE,

Appellee (Plaintiff).

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Respondent adopts the statement of jurisdiction contained in Appellant's Opening Brief, pages 4 and 5.

Statement of the Case.

Introductory.

(1) This is an appeal from a judgment based on four special verdicts of a jury and on findings of fact and conclusions of law of the District Court. The verdicts were of course rendered independently of the findings; and the Court's determinations, while adopting the jury's verdicts, were based on the independent findings of the District Court. All of the verdicts and all of the findings of the Court were unanimously favorable to the plaintiff, appellee. The whole record, including the independent findings of the District Court, likewise favorable to the plain-

tiff, establishes that the judgment as a whole accomplishes substantial justice.

(2) The evidence overwhelmingly showed and it is not disputed that plaintiff was a loyal and conscientious employee who rendered, and who was rendering at the time of his suspension on December 2, 1947, excellent services as a writer for the defendant. The evidence showed that the defendant motion picture employer, as the result of a joint policy agreement reached in New York on November 25, 1947, with other motion picture employers, suspended plaintiff's contract and his compensation and denied to plaintiff the opportunity of seeking work elsewhere until plaintiff complied with impossible conditions, imposed by defendant, because of plaintiff's alleged acts and conduct while a witness before the House Committee on Un-American Activities on October 30, 1947.

The defendant employer contended that the acts and conduct of Mr. Cole before that House Committee violated the so-called "morals clause" of his employment contract. The nature of those acts and that conduct of Mr. Cole before that Committee was presented fully to the Court and to the jury. Recorded transcriptions of everything which Mr. Cole said and did as a witness, together with motion pictures taken while he was testifying before the Committee, were fortunately available and were exhibited to the Court and to the jury.

The jury unanimously found that none of plaintiff's acts or conduct was shocking or offensive or tended to shock or to offend; and that none of plaintiff's acts or conduct prejudiced or tended to prejudice the employer. The Court independently likewise so found. There was no proof that the employer had suffered any actual prejudice or financial loss as a result of anything the plaintiff did or said.

None of the motion pictures with which plaintiff was identified as the writer was picketed or boycotted, nor did defendant show that any exhibitor cancelled exhibitions thereof or threatened to do so. Instead the evidence showed that the defendant continued to distribute these pictures widely all over the world subsequent to the date when plaintiff's act is supposed to have "shocked" and "offended" the community and prejudiced the defendant employer.

Upon some theory that is as yet unclear, and without any showing of prejudice or injury, the employer now asks that the judgment of the Court and jury should be reversed and that Mr. Cole should continue to be black-listed and economically destroyed—all because a group of motion picture employers met at the Waldorf Astoria Hotel and directed this particular employer to discharge or suspend this plaintiff because he dared claim a constitutional privilege when asked a question concerning his alleged political and trade union affiliations by a Committee of the Congress which had long publicly declared (and theretofore privately demanded of his employer) that Mr. Cole should be blacklisted by that private employer whom he had served faithfully and well. The answer unanimously given below by the jury and by the Court is the only answer consonant with our tradition of law and freedom.

(3) All of the facts point *unerringly* to the correctness of the decision of the Court and jury. As a matter of law, however, the judgment must be affirmed for under no circumstances may an employer exercise a right to suspend an employee without compensation, and without the right to work for another employer and, by imposing impossible conditions for relief from the suspension, deprive the employee of all right to earn a living forever or for

such time as the employer chooses. This was the precise right claimed by the employer here, and now sought to be vindicated by this appellant; it was, and it is, an unlawful claim of right.

(4) In the District Court some of the issues were submitted to the jury in the form of special interrogatories. In addition the Court made extensive findings of its own. The determinations of the jury in answering the special interrogatories were all favorable to the plaintiff. The findings of the Court likewise were favorable to the plaintiff. An affirmance even of less than all of the jury's verdicts requires an affirmance of the judgment because the verdicts provide separate and independent grounds for the judgment against the defendant, as will be disclosed more fully from the argument herein.

The Facts.

Appellee, Lester Cole, was employed by appellant, Loew's Incorporated, as a writer on a week to week basis early in 1945. His services were so satisfactory that in December, 1945, he was offered a term contract for a guaranteed period of two years at \$1,150.00 a week, with options to Loew's for additional periods of two years each at successive increases in salary. [Stip'n. R. 77-78.] In that employment appellee wrote screen plays for the motion pictures, "Fiesta," "Romance of Rosy Ridge" and "High Wall." These motion pictures were distributed by his employer in 1947 and 1948; and appellee's services were considered excellent by his employer. [R. 303, 260.]

In the Spring of 1947 the House Committee on Un-American Activities sent representatives to Los Angeles. They conducted a private hearing at which it was charged that appellee was a Communist, and it was urged that he be fired from the motion picture industry. This came 1

the attention of appellant [R. 397], but despite this information, Cole was told by E. J. Mannix, vice-president and general manager of appellant, that "*The studio policy and mine in particular is WE DON'T GIVE A DAMN WHAT PEOPLE WRITE OR SAY ABOUT MR. COLE'S POLITICS. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio . . .*" [R. 397.]¹ (Emphasis added.)

After the closed hearing by the House Committee in the spring of 1947, Eric Johnston, as spokesman for the motion picture industry, met with various motion picture executives, including the heads of Loew's Incorporated, and submitted a three point program to meet the demands of the House Committee. Point two of this program was the proposal that the motion picture industry refuse to employ "proven Communists." This proposal was unanimously rejected by the motion picture industry including Loew's Incorporated, because it would be a "potential conspiracy" and counsel for the industry "advised against it." [R. 810-811.]

Nevertheless the demands of the House Committee for the discharge of appellee and others continued. Late in

¹This was declared an official policy of the defendant with respect to its employment contract. It is of course the clearest possible admission by the appellant that the acts of the appellee now complained of, and the alleged reaction of the public thereto, were not acts or reactions of the kind included within the "morals clause" of the employment contract, nor proscribed thereby. This studio policy—"we don't give a damn what people write or say about Mr. Cole's politics."—stands in startling contrast to the belatedly conceived syllogism evolved by counsel for the appellant which formed the principal thesis of the appellant's whole case—*i. e.*, that "people believed Mr. Cole was a Communist because he did not disclose his political affiliation in answer to questions; that since he was believed to be a Communist, he was held in public scorn and contempt and thus prejudiced the employer, thereby violating the "morals clause." See pp. 2-3 of Appellant's Opening Brief.)

the summer of 1947 two representatives of the House Committee, Smith and Leckie, called on Louis B. Mayer and E. J. Mannix, executives of appellant. Mayer and Mannix, separately and with different degrees of emphasis, told the representatives they were not concerned with Cole's politics, whatever they might be. In the words of Mr. Mannix adopted by Mr. Louis B. Mayer, the official position of the studio [R. 332, 441, 442], was given to the Committee as follows:

"A. . . . They asked about certain people who worked for us.

Q. Do you remember who they asked about? A. They asked about Dalton Trumbo. They asked about Lester Cole, and well, I said, 'I don't give a damn whether they are Communists or not.'

Q. What did they ask you about? A. They wanted to know whether I knew if they were Communists, and I said, '*No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts for me, and my responsibility if he is a Communist or Democrat or Republican, that the ideology is not put on the screen, except entertainment is put there. I assume that responsibility and I feel that it is in good hands right now because our record is very clear.*'" [R. 289.] (Emphasis added.)

About the same time negotiations between Cole and Loew's were pending relative to an improvement in Cole's existing written employment contract. Cole had been promised a betterment of his contract if his work was satisfactory. There had been some delay in effecting the adjustment; and Cole notified his employer that if the demands of the House Committee and the reports concerning his political affiliations made Loew's unwilling

grant the adjustment, Cole was willing to terminate the contract and seek employment elsewhere. [R. 403, 438, 439.]

Loew's rejected Cole's proposal, and said that what the public thought about Cole's political affiliations was unimportant and whatever Cole's political beliefs were, was entirely his own business; that these were matters with which the studio was not at all concerned, and that the delay in effecting the adjustment was caused by a studio policy which required salary increases to be reviewed by New York executives. [R. 306, 401, 402, 403, 437, 438, 439.]²

²The evidence on this point is illuminating and undisputed. Negotiations looking to the upward revision of the existing contract were carried on by Mr. George Willner, Mr. Cole's agent, and by Mr. Cole personally. They discussed the matter of the delay in granting Mr. Cole a raise, together with the rumors and press reports concerning his political affiliations, with a number of studio executives, including Messrs. Vetluggin, Thaw, Cummings and Mannix:

(a) (Testimony of J. L. Cummings, Mr. Cole's immediate superior):

"A. I told Mr. Cole that I had talked to Mr. [Sam] Katz about getting an increase in salary. Mr. Cole, I might add, felt that he was entitled to an increase in salary and I thoroughly agreed with him. And on that basis, of his excellent work for me, the plans which we had for the future of making pictures—on that basis I went in and spoke to Mr. Katz.

Q. At about the time of these discussions between yourself and Mr. Katz, about the same time, there was called to your attention and you heard, did you not, of the claims that were being made concerning the alleged political activities of Mr. Cole? A. Yes; I had.

Q. After hearing the assertions made in the press and other places concerning Mr. Cole, you still felt, did you not, and so advised Mr. Cole, that he was entitled to have an upward revision of his contract? A. That is right. I don't know whether or not the article in the Hollywood Reporter came before or after that. I am not sure of the date.

Q. In any event, despite the rumors, you still felt and so advised Mr. Cole that you believed him entitled to an even

Finally tentative arrangements for bettering the terms of his then existing written contract were reached. It was tentatively agreed that Cole's position was to be greatly improved. Although the date for exercising the option to extend the contract for an additional two years had not yet been reached, Loew's agreed to exercise that option immediately. Thus Cole was guaranteed two additional years of employment beyond November 15, 1947. Furthermore instead of being guaranteed 40 weeks of employment in each year, the company agreed to obligate itself to give him 52 weeks of employment each year; other improvements in the contract included a six weeks paid vacation annually (none was given under the original contract), and the right to take six additional weeks leave without pay. [Pltf. Ex. 3.]

On September 19, 1947, Cole was served with a subpoena to appear as a witness before the House Committee.

better contract than the one he then had, is that true? A. That is right." [R. 306.]

(b) (Testimony of George Willner):

"Q. And where did you see Mr. Vetluggin? A. I saw him in Mr. Vetluggin's office.

Q. And what was the conversation with Mr. Vetluggin? A. . . . And I also reminded Mr. Vetluggin or told him at the very same time there was an editorial and stories which were appearing in regard to Mr. Cole being a Communist, if I recall, an editorial by Mr. Billy Wilkerson of the Hollywood Reporter, in which Mr. Wilkerson said Lester Cole was a Communist; that he should be driven from the industry or he should be blacklisted. There many such stories and articles which appeared in the Reporter. There was one which concerned Mr. Cole and myself greatly, in which I think it was Mr. Thomas made the statement that all of these writers and supposed Reds, including Mr. Cole, would be driven from the industry within 60 days. I asked Mr. Vetluggin pointblank if these articles, these editorials and these rumors, which were current in the studio, were having their effect on the fact that this contract was not being negotiated, and Mr. Vetluggin told me that the studio policy was such that they were not con

The subpoena was actually served in the office of F. L. Hendrickson, who was head of the contract department at appellant's office. [R. 446.] Mr. Hendrickson was present while the service was made, and immediately afterward asked Cole to proceed to the business at hand, that is to say, to conclude the arrangements to better Cole's existing contract. Some three days later appellant forwarded to Cole a copy of the amendments to the contract, executed on behalf of appellant. [R. 448.]

Before leaving for Washington, Cole was asked by his immediate superior to take his story material with him so that he could work on it while he was away. Cole complied with this request and actually did work while he was in attendance in Washington. [R. 449-450.]

cerned with what a writer did as far as politics were concerned. . . ." [R. 400-401.]

(c) (Testimony of George Willner):

"Q. Will you be good enough to tell us, in substance or effect, what you said to Mr. Mannix at that time and what he said to you? A. . . . The conversation carried along about 10 minutes along the lines of the possible direction by Mr. Cole, until we came to the point of Mr. Cole's politics. I said that Mr. Cole had told me that he was very concerned about the fact that possibly the studio was not improving his position at that time because of the fact there were many articles and editorials in the local trade papers, namely, the Hollywood Reporter, and that possibly the studio executives were taking that into consideration in not improving Mr. Cole's position. As near as I can recall Mr. Mannix' exact words, they were, 'The studio policy and mine in particular is we don't give a damn what people write or say about Mr. Cole's politics. We are concerned primarily with Mr. Cole as a craftsman and what he does for this studio.' He also said that Mr. Cole was a most loyal, most conscientious and most dependable craftsman, 'and we have only the highest regard for his ability.'

Q. Did he refer to him as loyal? A. Yes; extremely loyal.

Q. Do you remember that specifically? A. I do.

Q. Have you now told us substantially everything you recall about Mr. Mannix' conversation at that time? A. Yes. We left with Mr. Mannix saying he would see what could be done." [R. 396-397.]

The hearings commenced on October 20, 1947, and were suspended on October 30, 1947. Cole testified on the last day.

The attitude of appellant toward the hearings was publicly manifested in the following manner.

Eric Johnston, as spokesman for the motion picture industry including appellant, signed an advertisement which appeared in the Washington Post and in the New York Times on October 27, 1947, in effect excoriating the House Committee and its procedures. [Pltf. Ex. 6, R. 454.] Here are excerpts:

“Too often, individuals and institutions have been condemned without a hearing or a chance to speak in self-defense; slandered and libeled by hostile witnesses not subject to cross-examination and immune from subsequent suit or prosecution. Legal counsel cannot be heard except at the committee’s pleasure. Too often this protection is limited to advice on constitutional rights. The committee can accept or reject explanatory statements for the record.

* * * * *

“Today the motion picture industry, a part of which I represent, is under investigation by the Committee on Un-American Activities of the House of Representatives. Its procedure, good and bad, is the common practice of all investigating committees. The present investigation serves to emphasize my thinking on the need for reform.

“I am thoroughly aware that a Congressional investigation is a fact-finding inquiry and not a trial; that a committee is neither a prosecutor nor a court; that it neither indicts nor convicts. But in practice the committee becomes prosecutor, judge, and jury and the individual becomes the defendant.

“With no vested right to be heard and no vested right to challenge accusations against him, the innocent citizen is helpless. He can be indicted and convicted in the public mind on the unchallenged say-so of a witness who may be completely sincere, but can be either misinformed or riddled with prejudice. Without fear of reprisal, a prejudiced witness can exercise venom as well as veracity.

“The time to challenge an attack or a misrepresentation is at the hour it is made. The longer the delay, the greater the damage.

“In America, we hold that the individual is a higher power than the state which derives from him its own authority and must treat him accordingly. The sovereign rights and dignity of the individual supersede all else. There is no place in our society for any procedure or practice which cuts away part of those rights. There can be no such thing in America as a half-citizen.

* * * * *

“One of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty. This concept is so dear to us that we say it is better for twelve guilty men to escape than for one innocent man to suffer.

“This is in direct contradiction to the practice of the police state. In Russia, the state has all the rights, and the individual has none. There a man is guilty until he proves his innocence, and too often innocent men are condemned before a guilty one is found.

“We surround our defendants in courts of law with a multitude of protective devices. To name but a few—

“We assign them counsel when they cannot themselves afford it; they have the right of cross-exami-

nation; prospective jurors can be challenged; and the judge himself can be disqualified on grounds of prejudice.

“These protections and safeguards are denied or short-circuited in Congressional inquiries.

“I do not suggest that investigating committees adopt and pursue the procedure of the courts. We cannot expect the identical procedure of a court of law and accomplish the purpose of a Congressional investigation.

“I am suggesting only that there are too many weaknesses and evils in present procedure. I am proposing a fresh look as a basis for reform. Besides the right of the individual, there is another vital factor. Whenever a Congressional committee in its effort to expose or develop facts has injured an innocent individual, it has injured itself more. The entire institution of the Congress suffers. We arm the advocates of paternalism and the police state and undermine the legislative system.

* * * * *

“Congress, the representative body of the people must be scrupulous in its relationship with the people and as an institution must be at all times above reproach.

“Today, the individual is crushed in many lands. The eyes of the people of the world who want liberty and freedom look to America as the last hope and the last refuge of free and dignified men.

“Congress must take positive action to re-emphasize the rights of man, the citizen.

“I earnestly appeal to you to initiate this needed reform at the next session of the Congress.

“/s/ ERIC JOHNSTON

Motion Picture Association of America, Inc. 1601 Eye Street, N. W., Washington 6, D. C.

This Advertisement Is Published as a Public Service

Paul V. McNutt, one of the attorneys especially employed for these hearings by the motion picture industry, held a press conference on October 22, 1947 [Pltf. Ex. 7], stating:

“He said also that as a lawyer he would advise the industry to avoid concerted action to compile a black-list of Communist writers, directors and other studio employes with the idea of denying employment to them.

“Such action, he asserted, was without warrant of law and was not in accord with an announced policy of Congress or rulings of the Supreme Court, and, therefore, would involve the producers in serious legal difficulties.” [R. 460.]

A day later McNutt told the press [Pltf. Ex. 8]:

“Free speech is the foundation of the American Constitutional System. . . .

“It does not require a law to cripple the right of free speech. Intimidation and coercion will do it. Fear will do it. Freedom simply cannot live in an atmosphere of fear. . . .

“If the motion picture industry can be called before a committee and challenged on the content of the screen, then why not the newspaper, radio, magazine and book-publishing business? Will they be safe if some Congressional Committee is allowed to try to dictate and control the screen’s content? Of course, they won’t.” [R. 461-462.]

On the same day Mr. McNutt declared himself [Pltf. Ex. 9] “shocked to see the violence done to the principle of free speech” during the hearing conducted by the House Committee at which Mr. Cole was later to be called to testify.

On October 27, 1947, Eric Johnston testified before the House Committee saying in positive terms that the motion picture industry would not blacklist anyone on the ground that he was a Communist. [R. 469-470.] Other press conferences and public statements were to the same effect. [R. 464.]

Mr. Cole was present in Washington from October 20, and was aware of these public utterances of his employer. Loew's Incorporated likewise knew Cole's attitude toward the hearings. On October 19, 1947, the evening before the hearings commenced, the attorneys for the motion picture employers met with Cole's attorneys and the attorneys of those who had been subpoenaed to testify. At this meeting Cole, through his attorneys, told his employer's counsel that he had given notice of a challenge to the House Committee's power to hold the hearings. The employer's attorneys were handed copies of a telegram stating various constitutional grounds of challenge and including this sharp attack:

"The Committee does not have any lawful legislative purpose. Its sole purpose as exemplified by its acts and conduct is to stifle free thought and expression." [R. 412.]

At the conclusion of this conference Eric Johnston, as spokesman for the employers, gave his firm assurance that there would be no blacklist. [R. 409.]

Mr. Cole testified on October 30, 1947. The questions put to him by the Committee and his responses and his conduct while before the Committee were transcribed as they had originally occurred, onto a recording, and were played to the jury twice during the trial [Pltf. Ex. 14 R. 484]; and, while Mr. Cole was testifying before the Committee motion pictures of his appearance were made

and this film with sound was likewise exhibited to the jury. [Pltf. Ex. 15, R. 701-702.]

Maurice Benjamin, attorney for the employer, was present at the hearings from October 20-30, 1947. At no time did he give any instructions to Mr. Cole with respect to his conduct or actions toward the Committee. [R. 696.]

Prior to Cole testifying on October 30 and thereafter until November 27, 1947, there had been no intimation that his employment might be jeopardized in any way by his conduct in Washington. On the train returning from Washington he discussed the hearings with Mr. Mayer, head of the studio, and commiserated with him on the bad treatment the Committee had accorded him. [R. 362.] Among other things, Mayer told Cole it would have been better if he had answered the questions and had frankly told the public that he was or was not a Communist, whatever the fact was, and "that it was no crime," as Mr. Mayer saw it, "to belong to the Communist Party at the present time."³ [R.362.]

Cole returned to work and rendered his customary services until December 2, 1947 (approximately a month after his testimony); for the week ending November 22, 1947, Mr. Cole was paid at the increased rate of compensation established by the amendment to his contract, and for the week ending November 29, 1947, he was likewise paid at this increased rate. [R. 695.]

On November 19, 1947, Mr. Eric Johnston, the president of the Motion Picture Producers Association, had

³(But it was at the later Waldorf Astoria meeting of the producers that a new condition of employment was imposed, one not heretofore required or contemplated, viz., the signing of a non-Communist affidavit.)

publicly declared on behalf of the producers, including Loew's Incorporated, that Mr. Cole may have had the authority to challenge the Committee as he did, and that the question was something which first had to be tested in the courts [R. 805-806], and that "one of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty." [R. 806.] On December 2, 1947, Loew's Incorporated knew that no charges had been made in any court against Mr. Cole [R. 808]; nor had he as at the date of the trial ever been found guilty of any offense. [R. 859-862.]^{3a}

On November 24, 1947, a conference of motion picture executives was held at the Waldorf Astoria Hotel in New York City. The meeting lasted three days. As a result of strong pressures exerted by Eric Johnston, there came out of this meeting the so-called joint policy statement [R. 795] pledging joint action by all motion picture employers to blacklist a group of persons, including plaintiff, who testified before the House Committee:

"We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the ten until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist." [R. 795.]

^{3a}The alleged offense, contempt of Congress, is a misdemeanor (2 U. S. C. 192.) As is said in *Sinclair v. U. S.*, 279 U. S. 261 at page 298, 13 L. Ed. 688, 49 S. C. 268: "The gist of the offense is refusal to answer pertinent questions. *No moral turpitude is involved.*" (Emphasis added.)

Mayer and Mannix, West Coast executives for Loew's, went along with the statement of policy with obvious reluctance. It is plain inference from the testimony of these executives that Cole was suspended only because of the coercive effect of the joint policy statement. [R. 339, 340.]⁴

On December 2, 1947, over a month after giving his testimony, Cole was handed the notice of suspension. Loew's continued and now continues to distribute the films written by plaintiff; these films advertise upon their face

⁴The circumstances surrounding the giving of the notice of suspension were these: Mr. Mannix called Mr. Cole on the morning of December 2, 1947, stating: "Lester, I want you to know there is nothing personal in what I am going to do now but I am sending you by registered mail a notice of your suspension." He (Mr. Mannix) repeated: "You know that this has nothing to do with me. It is not personal. But I am told to do it and I am doing it."

"And I (Mr. Cole) replied that he might not feel it was personal but, if he could convince my kids that it wasn't personal, that would be better; that I couldn't feel it that way; that he had promised me months before that he didn't give a damn what my alleged political associations were as long as I performed my work ably, and that I considered, in sending me this suspension, it was a personal betrayal." [R. 490.]

Mr. Mayer testified on the matter of the giving of the notice of suspension as follows:

Q. Isn't it a fact that your action that was taken was taken as a result of and pursuant to the policy which was adopted on November 26, 1947, at this meeting in New York City, at the Waldorf-Astoria Hotel? A. That was agreed upon at that meeting but my instructions came from our own officers.

Q. To follow out that policy, isn't that correct? A. They said, 'We are not firing him. We are suspending him until he is proven guilty or innocent of contempt.'

Q. But their instructions were given pursuant to that policy, which Loew's was a party to, and in order to follow out and effectuate the policy at that meeting, isn't that correct? A. It was given at that meeting." [R. 339.]

the name of plaintiff as their writer. [R. 866.]⁵ Such pictures were not picketed nor boycotted nor did defendant offer any proof of any loss of continued revenues from such pictures by reason of plaintiff's identification with them as their writer. Since the date of his suspension Mr. Cole has been ready and willing to render his services for Loew's. [R. 490.]

The Pleadings.

The complaint for declaratory relief, besides alleging the written contract of employment, the notice of suspension, and the controversy between the plaintiff and defendant, also alleges that the plaintiff will be irreparably injured in that "by reason of said purported suspension plaintiff is required to refrain from seeking employment elsewhere and is required to remain uncompensated and unemployed and is prevented from finding gainful employment in the motion picture industry and is prevented

⁵(a) With respect to the picture "High Wall," on which Mr. Cole received credit as the writer, that picture was released on February 2, 1948, and was exhibited in 11,983 theatres.

(b) The picture "Fiesta" upon which Mr. Cole received credit as a writer, was first released on July 18, 1947. Between July 18, 1947, and December 8, 1948, it was shown in 14,365 theatres. Between October 30, 1947, and December 2, 1947, it was shown in 871 theatres, and from December 2, 1947, to December 8, 1948, it was shown in 2,365 theatres.

(c) The picture "Romance of Rosy Ridge" on which Mr. Cole received credit as a writer has been shown in 14,149 theatres; during the five weeks between October 30, 1947, and December 2, 1947, it was shown in 1,730 different theatres and between December 2, 1947, and December 8, 1948, it was shown in 3,206 separate theatres. [R. 866-867.]

from writing and selling any literary material to any other motion picture producer, publisher or theatrical producer.” [R. 5-6.]

The contract of employment, attached to the complaint, contains the following provisions:

“3) The employee expressly agrees that he will render his services solely and exclusively for the producer throughout the term hereof and that during said term he will not render services of any kind or nature whatsoever either to or for himself or to or for any person, firm or corporation other than the producer, without the written consent of the producer first had and obtained.” [R. 8.]

“11) . . . The employee hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the employee . . . In the event of the failure, refusal, or neglect of the employee to perform his required services or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at his option, . . . may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. . . . Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative and not one of them as exclusive of the others or of any right or remedy allowed by law.” [R. 17-19.]

“12) . . . During the period of any such suspension . . . the employee shall not have the right to render his services to or for any person, firm or corporation other than the producer without the written consent of the producer first had and obtained.” [R. 20.]

“5) The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.”

After answer by the defendant the plaintiff moved for a judgment on the pleadings, contending that no issue of fact remained to be tried. [R. 220.] The motion was denied. [R. 232.]

Thereafter the District Court made its pre-trial order [R. 77-85], including the following:

“IV.

“Nothing in this order contained shall be a determination or finding contrary to plaintiff’s contention herein that there are no issues of fact to be tried or that any of the issues of fact heretofore in . . . set out is in reality an issue of law.”

Summary of Argument.

I. JUDGMENT SHOULD HAVE GONE FOR APPELLEE AS A MATTER OF LAW.

(a) UPON THE WHOLE RECORD IT IS CLEAR THAT THE VERDICT AND JUDGMENT WERE CORRECT.

(b) THE ATTEMPTED SUSPENSION WAS INEFFECTIVE BECAUSE THERE WAS NO RIGHT TO SUSPEND FOR A VIOLATION OF THE MORALS CLAUSE.

(c) THE LANGUAGE OF THE CONTRACT, AND THE CONTEMPORANEOUS CONSTRUCTION OF THE CONTRACT BY THE PARTIES, SHOWS THAT POLITICAL CONDUCT WAS EXEMPTED FROM THE MORALS CLAUSE.

(d) APART FROM THE VERDICTS, THE UNDISPUTED EVIDENCE REQUIRED JUDGMENT FOR THE PLAINTIFF FOR THERE WAS NO RIGHT TO SUSPEND AT THE DIRECTION OF A COMBINATION OF EMPLOYERS.

(e) IN ANY AND ALL EVENTS THE CONDITIONS IMPOSED BY APPELLANT FOR RELIEF FROM SUSPENSION RENDER THE SUSPENSION VOID.

II. THE INSTRUCTIONS WERE FREE FROM ERROR AND IN ANY EVENT NO PREJUDICE TO APPELLANT IS SHOWN.

III. THE TRIAL COURT'S RULINGS ON EVIDENCE WERE FREE FROM ERROR.

IV. THE AFFIDAVIT TO TRANSFER THE CAUSE DID NOT DISCLOSE ANY PERSONAL BIAS OR PREJUDICE OF THE TRIAL COURT AND WAS INSUFFICIENT.

ARGUMENT.

I.

Judgment Should Have Gone for Appellee as a Matter of Law.

(a) Upon the Whole Record It Is Clear That the Verdict and Judgment Were Correct.

The short answer to appellant's position is this:

(1) The employer in construing the meaning of this contract and the meaning of the effect of the public discussion of Mr. Cole's alleged political affiliation, declared that it did not "give a damn" what people wrote or said about those political affiliations; and, despite press clamor and congressional demand for Mr. Cole's discharge, the employer bettered the terms of his then existing written contract. Its interest was in Mr. Cole's work as a screen writer, not with his alleged political unorthodoxy, his manifestations thereof or the public reaction thereto. At a minimum, this makes completely untenable the claim now made that the morals clause was violated because of that asserted public reaction to Mr. Cole's failure to responsibly declare to the Committee what those affiliations were. This for the reason that the best proof of the meaning of a contract is its practical construction by the parties.

See:

4 Cal. Jur. Supp., discussion, pages 133, 134;

3 *Williston on Contracts*, Section 623;

Mitau v. Roddan (1906), 149 Cal. 14, 84 Pac. 145;
6 L. R. A. (N. S.) 275;

Holman v. Musser (1922), 59 Cal. App. 734, 21
Pac. 33;

- Coast Counties Real Estate & Inv. Co. v. Monterey County Water Works* (1929), 96 Cal. App. 269, 274 Pac. 415;
- Katz v. People's Finance & Thrift Co.* (1929), 101 Cal. App. 552, 281 Pac. 1097;
- Work v. Associated Almond Growers* (1929), 102 Cal. App. 232, 282 Pac. 965;
- Storm & Butts v. Lipscomb* (1931), 117 Cal. App. 6, 3 P. 2d 567;
- Hansen v. D'Artenay* (Geldberg) (1932), 121 Cal. App. 746, 9 P. 2d 889;
- Herrlein v. Tocchini* (1933), 128 Cal. App. 612, 18 P. 2d 73;
- Skousen v. Herz* (1933), 135 Cal. App. 116, 26 P. 2d 498;
- Carstens Packing Co. v. Miller* (1935), 10 Cal. App. 2d 48, 51 P. 2d 161;
- Weaver v. Grunbaum* (1939), 31 Cal. App. 2d 42, 87 P. 2d 406;
- Swarthout v. Gentry* (1943), 62 Cal. App. 2d 68, 144 P. 2d 38;
- Union Sugar Co. v. Hollister Estate Co.* (1935), 3 Cal. 2d 740, 47 P. 2d 273;
- Roy v. Salisbury* (1942), 21 Cal. 2d 176, 130 P. 2d 706, on hearing after 49 A. C. A. 270, 121 P. 2d 109;
- California Pack. Corp. v. Grove* (1921), 51 Cal. App. 253, 196 Pac. 891;
- Nicolaysen v. Pacific Home* (1944), 65 Cal. App. 2d 769, 151 P. 2d 567.

The proof on this point is clear; it established that the acts now complained of were not acts of the kind which gave rise to the right to claim a violation of the morals clause. In addition, it established the norm of performance required by the employer and rendered performance by the employee in a different degree unnecessary. (See particularly *Carpenter v. Norcross*, 204 Fed. 537; *Child v. Boyd*, 175 Mass. 493, 56 N. E. 608; *Herbert v. Wood*, 185 N. Y. Supp. 325, 113 M. 671.)

In fact therefore the Court's instructions to the jury were much more favorable to the defense than the undisputed facts required.

(2) The evidence showed that the employer challenged the conduct of this Committee in this particular Hollywood investigation, (a) by sharply worded ads placed in newspapers of national circulation "as a Public Service"; (b) by public statements made by its counsel in the press and over national radio hook-ups, asserting that the particular investigating committee was trying to "dictate and control the content of the screen." The employee on the other hand challenged the conduct of this committee by asserting that the Bill of Rights to the Federal Constitution protected a citizen's political belief and affiliation against compulsory disclosure at the command of a legislative committee.

In America it has never been considered immoral or obscene to assert in one form or another the existence of certain claimed private rights and privileges (both individual and corporate) even as against the counter-assertion by the Congress that such rights and privileges do not in fact exist. "In democratic countries, it is not only the right but the duty of every citizen to review and complain of official misconduct, to criticize existing laws, to

favor or oppose changes, and to petition for redress of grievances." (Patterson, Free Speech and a Free Press, p. 7.)

And one who raises a constitutional right to be free from legislative inquiry into his political affiliation is not thereby committing any act involving "moral turpitude," (*Sinclair v. U. S.*, *supra*), nor is the act *malum in se*. Indeed the rationale justifying such challenge to officialdom is spelled out by the principle that "The right of association appears to be almost as inalienable in its nature as is the right of personal liberty. No legislator can attack it without impairing the foundations of society." (*de Tocqueville, Alexis, Democracy in America*, Vol. I, p. 196.) And see the Opinion of the Supreme Court in *West Virginia v. Barnette*, 319 U. S. 624, 642, 87 L. Ed. 1628, 63 S. C. 1178:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be *orthodox in politics*, nationalism, religion or other matters of opinion, *or force citizens to confess by word or act their faith therein*." (Emphasis added.)

Of course, one might disagree with the method selected by Mr. Cole to challenge this claimed authority, just as one might disagree with Mr. Johnston's ad excoriating the Committee or with Mr. McNutt's sharply worded comments. But such disagreement is the well-spring of the democratic way of life—it is not a shocking or offensive act as contemplated either by the contract or by any reasonable standards for judging human conduct. Reasonable persons might disagree with all the methods chosen to challenge the claimed authority to investigate the content of the screen and the content of the minds of those who

write for the screen. But the contract of the parties does not provide that Mr. Cole's employment was to be forfeited if he did an act with which others disagreed. The morals clause deals with acts which "shock" and "offend" public morals and conventions. Political differences, however strong, are not of that class in the sense used in the contract or by the parties.⁶

And finally of course at the time of the service of the notice of suspension, no charge of any kind had been filed in any court against Mr. Cole and at the time of trial he had not been found guilty of any offense by any court. (This is still true as of the time of the filing of this brief.)

Fortunately here recorded transcriptions of every word said by Mr. Cole while a witness before the Committee were available and were heard by the jury twice. Motion pictures taken while he was before the Committee and showing his exact conduct were likewise exhibited to the jury. It unanimously concluded that nothing Mr

⁶Our contemporary history is replete with instances where both individuals and corporations like this appellant have challenged claimed authority by asserting it to be unconstitutional and by seeking court tests to determine the constitutionality of the official acts. The challenges of the Wagner Act and the National Labor Relations Board are examples. In this case there was no effrontery of contemptuous challenge to a settled law. In fact, the conduct of the un-American Activities Committee in these very hearings has been seriously questioned on constitutional grounds by scholars of great repute in the leading law periodicals of our country. See 46 Mich. L. Rev. 521; 47 Mich. L. Rev. 191; 33 Cornell L. Q. 565; 17 Univ. of Cincinnati L. Rev. 264; 14 Univ. of Chicago L. Rev. 256; 6 Harvard L. Rev. 592 ("Loyalty Tests and Guilt by Association," John Lord O'Brien); 43 Ill. L. Rev. 253; 60 Harvard L. Rev. 1193 ("Report on a Report of the House Committee on Un-American Activities"), Walter Gellhorn; 47 Col. L. Rev. 416; 37 Georgetown L. Journal 104; 1 Baylor L. Rev. 212; 2 Rutgers Q. Law Rev. 125; 27 Neb. L. Rev. 608; 26 Texas L. Rev. 816; 15 Univ. of Chicago L. Rev. 544 ("Letter to President from Yale Law School Faculty"); 34 A. B. A. J. 15; 22 So. Cal. L. Rev. 46.

Cole did, as charged in the notice of suspension, was shocking or offensive, or degrading, nor did it have the tendency to shock or offend or degrade, nor did it expose or tend to expose him to public hatred, contempt, scorn or ridicule or prejudice or tend to prejudice the producer. And the producer offered no competent evidence to show the conduct complained of had that claimed effect.

Under the circumstances therefore the verdict of the jury and the independent judgment of the Court comported with substantial justice; upon the whole record it is apparent that no injury could have resulted from any claimed error in the course of the trial, and therefore the appeal must be affirmed. (See *Carlisle v. Sandeagle*, 259 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 510; *Sun v. Vinton*, 248 Fed. 263; *Hornblower v. City of Pierre*, 241 Fed. 450.)

(b) The Attempted Suspension Was Ineffective Because There Was No Right to Suspend for a Violation of the Morals Clause.

A right to suspend an employment does not exist under general law, nor may it be derived by implication. If it exists at all, it exists by reason of express provisions of a contract. In seeking to exercise a right to suspend, appellant was seeking to exercise what it believed was a right under the contract, and in so doing it affirmed the continued existence of the contract.

The clause in the contract from which the right to suspend is sought to be derived is:

“In the event of the failure, refusal or neglect of the employee to perform his required services or ob-

serve any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, . . . may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues.” [R. 17-18.]

What is the effect of a suspension under this clause?

First: The employee is not permitted to work for the employer, and the employer will pay him no salary. [Contract Article 11, R. 17.]

Second: The employee may not work for anyone else. [Contract Article 12, R. 19-20.]

Third: The producer may extend the term of the contract for the term of the suspension. [Contract Article 11, R. 17; Contract Article 12, R. 19.]

Fourth: The employer is expressly given the right to have an injunction to prevent any violation by the employee. [Contract Article 11, R. 17.]

Thus during suspension the employee can gain no livelihood, nor can he wait out the duration of the contract.

Appellant, contending that Cole had violated the so called “morals clause” [Contract Article 5, R. 12], purported to suspend him under the provisions of Contract Article 11, quoted above.

Appellee contends:

(a) There is no right to suspend for a violation of the "morals clause."

(b) The language of the contract shows, and the contemporaneous construction of the contract by the parties shows, that political conduct and the effect of the public reaction thereto were exempted from the "morals clause."

(c) A right to suspend at the employer's discretion is not the same as a right to suspend in compliance with contract with a combination of employers.

(d) In any and all events the conditions imposed by appellant for relief from suspension render the suspension void.

(a) There can be no suspension for a violation of the "morals clause." We direct attention first to the fact that Article 8 of the agreement specifically gives the producer the right to suspend for the employee's incapacity; Article 9 likewise gives the producer the right to suspend if its operations are impeded by *force majeure*.

Neither of these articles is pertinent except to illustrate the difference in language used in Article 11. This article does not use the word "suspend"; it gives the employer the right to refuse to pay compensation.

The right to refuse to pay compensation is, of course, the right to apply economic pressure in order to assure the employer that he will have performance by the employee in accordance with the employee's undertakings. What is contemplated by Article 11 is a breach of a continuing nature. This is manifested by the use of such language as the employee's "failure, refusal or neglect." The language is aimed at *inaction* rather than malfeasance. It

cannot deal with a case where the employee commits a single affirmative act constituting a breach, unless there is something which the employee has the obligation and the power thereafter to do in order to remedy the breach.

Thus a reading of Article 11, having in mind the contrasting language of Articles 8 and 9, and having in mind the practical ends to which the contract must be aimed, leads only to the conclusion that the right to refrain from making payments of compensation may be exercised only in those situations in which it lies within the power of the employee to remedy his breach. Otherwise, the right to suspend payment, and to continue to extend the contract for the period of suspension in a case in which it is beyond the power of the employee to remedy the situation, would give the employer the right to remove the labor and talent of his employee from the market forever.

(c) The Language of the Contract, the Contemporaneous Construction of the Contract by the Parties and the Public Policy of the State of California Show That Political Conduct Was Exempt From the Morals Clause.

Statutory law, so far as relevant to a contract, is deemed to be written into it. (*Stockton Savings Bank v. Massanet*, 18 Cal. 2d 200, 206, 114 P. 2d 592; *Guardianship of Oumjuian*, 4 Cal. 2d 659, 661, 52 P. 2d 220; *Mott v. Cline*, 200 Cal. 434, 446, 253 Pac. 718.)

California Labor Code, Sections 1101, 1102 and 1103 forbids the use by an employer of the employment relationship to control or even to influence the political action or activity of his employees. And this language of the Labor Code has been held to be imported into contracts of employment, so as to permit a suit by an employee against his employer on the contract of employment where the

employer violates these provisions. (*Lockheed v. Superior Court*, 28 Cal. 2d 481, 486, 171 P. 2d 21, 22.)

Furthermore as if to make this contention explicit, Article 15 of the Contract [R. 22] provides that whenever there is any conflict between any provision of the agreement and any statute, the latter shall prevail, and the agreement shall be curtailed to the extent necessary to bring it within the legal requirements.

Reading the morals clause with Article 15 of the contract and with the Labor Code, the conclusion is compelled that the general language of the morals clause was not intended to include conduct in the field of politics. Appellant itself construes Cole's conduct as being political in its argument based on the attitude of the public toward Communists, although this argument is founded on narrow colloquial usage of the word. The Labor Code being a remedial statute and designed to effect a beneficent social policy should be construed broadly rather than narrowly. There can be little doubt that Cole's conduct was "political" in the highest sense of the word. [Cole's conduct before the Committee asserted what he believed to be the rights of a citizen with relation to his government.] For example of the use of the word "politics" as a course or line of activity consistent with a theory of political philosophy see Section 1 of the California Political Code defining the contents thereof; Lindsay Rogers, in the Encyclopedia of the Social Sciences, Volume VI, page 24, saying that politics embraces the relations between the State and the individual and in this sense is practically synono-

mous with political philosophy; see *In re Kemp*, 16 Wisc. 382, at 419; *Norton v. Letton*, 111 Southwestern 2d 1053, 1057, 271 Ky. 353. See also *Fisher v. Masters*, 83 P. 2d 212, 217, 29 Cal. App. 2d 66, 67; *Commonwealth v. McCarthy*, 85 A. L. R. 1141, 1144, 183 Northeastern 495, 281 Mass. 261; *People Ex. Rel. v. Morgan*, 90 Ill. 558, 562; *Dorsett v. State*, 289 Pac. 298, 304, 106 Cal. App. 416; *United States v. Wurzbach*, 31 F. 2d 774; *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Ore. 580; *Lucker v. Curtis*, 136 P. 2d 978, 983, 64 Ida. 498; *Blackman v. Stone*, 17 Fed. Supp. 102, 107.

And it is axiomatic that the best test of the meaning of the language of a contract is to be found in the practical and contemporaneous construction of it by the parties themselves. Here there can be no doubt at all that the defendant did not consider either Mr. Cole's alleged political unorthodoxy, or the public reaction thereto to be matters within the sweep of the morals clause. At the very time when this same House Committee was demanding Cole's discharge because of his alleged affiliations and at the very time that public excitement was high with respect thereto, this employer, by its repeated declarations showed it never believed that the morals clause of its contract embraced any of the matters which it now relies upon as the purported justification for this violation by it of the employment agreement. Its own construction of its terms belies the whole argument and reveals it for what it essentially is—a belated attempt to excuse the inexcusable.

(d) **Apart From the Verdicts, the Undisputed Evidence Required Judgment for the Plaintiff, for There Was No Right to Suspend at the Direction of a Combination of Employers.**

The power to suspend or to refuse to pay salaries is a delicate power. Even in the most obvious cases it verges on the border of what should not be permitted under sound public policy, because it deprives an employee of the opportunity to make a living and deprives the public of the fruits of the employee's labor. In this case the public would lose the benefits of the creative efforts of an established writer. Under these circumstances, the right of an employer to suspend should be narrowed to its legitimate ends.

In the present case the undisputed evidence showed clearly that Loew's, in suspending, was not acting under its own discretion but was acting under the coercive effect of a combination of motion picture producers. [R. 39.] A proper construction of the morals clause and the employment contract as a whole should forbid such a suspension.

"The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

Truax v. Raich, 239 U. S. 33, 38, 60 L. Ed. 131, 36 S. C. 7.

And in the same case it was said:

“The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others.”

239 U. S. 38.

See, also,

DeMarais v. Stricker, 152 Or. 362, 53 P. 2d 715.

The last cited case distinguishes between the free exercise of a right to terminate by an employer and a termination which is caused by improper interference of others.

(e) In Any and All Events, the Conditions Imposed by the Employer Were Such as to Render the Purported Suspension Void.

The notice of suspension advised Cole that the suspension would continue until (1) Cole had been acquitted or purged of contempt; and (2) he declared under oath he was not a Communist.

It is obvious that appellant did not have the power to impose these conditions. Nothing in the contract gives to the employer the right to demand any of these acts on the part of appellee, and the power to suspend is given only for the purpose of compelling performance of those duties undertaken by the employee, not additional duties.

Every contract by which one is restrained from engaging in a lawful profession is void, unless the case falls within one of the recognized exceptions, as in the case of a sale of good will. Every contract which forbids one to practice a lawful profession for an indefinite period of time is automatically void. (*Business and Profession Code* 1660 (formerly Civil Code 1673); *More v. Benner* 40 Cal. 251; *Wright v. Rider*, 36 Cal. 342; *Callahan* v.

Donnally, 45 Cal. 152; *Hunter v. Superior Court*, 97 P. 2d 492, 36 Cal. App. 2d 100; *Getz Bros. & Co. v. Federal Salt Co.*, 81 Pac. 416, 147 Cal. 115; *Vulkan Powder Co. v. Hercules Powder Co.*, (31 Pac. 581), 96 Cal. 510; *Martin v. Hawley*, 50 S. W. 2d 1105; *Wisconsin Ice and Coal Co. v. Lueth*, 213 Wis. 42, 250 N. W. 819; *Summitt Baking Co. v. Bahrehns*, 251 N. W. 826, 125 Neb. 718, 251 N. W. 826; *Supermaid Cookware Corp. v. Hamil*, 50 F. 2d 830, certiorari denied 284 U. S. 677, 76 L. Ed. 572, 52 S. C. 138; *Walker Coal and Ice Co. v. Westerman*, 263 Mass. 235, 160 N. E. 801; *May v. Lee*, 28 S. W. 2d 202.)

Furthermore, the demand that Cole state on oath that he is not a Communist cannot be made a condition of suspension. Waiving for the moment the question whether it might be made a ground of termination, it is obvious that to suspend an employee until he shall declare under oath he is not a Communist might conceivably deprive him of the right to earn a living; for if a man were a Communist (which this employer had previously repeatedly said was of no concern to it), he could not work for Loew's Inc. nor for any other employer unless he were willing (1) to perjure himself or (2) to change his private political belief to suit his employer.

Appellee insists however that the imposition of this condition was beyond the powers of the employer. It is in direct contravention of California Labor Code Sections 101, 1102 and 1103.⁷ (*Lockheed Aircraft Corp. v. Superior Court*, *supra*.)

⁷Section 1102 provides:

"Coercing or Influencing Political Activities of Employees. No employer shall coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Should the employment contract conceivably be subject to a construction which would permit the employer to control his employee's politics, that construction must needs be avoided unless (which is not the case here) no other construction is possible. Any contract by which one is given power to determine the political conduct of another would be void. (*Restatement of Contracts*, Section 567.)

Contracts which tend to influence the political integrity of the citizen by means of offers of financial benefit are void. (*Martin v. Wade*, 37 Cal. 168; *Newell v. Purdy*, 36 Wis. 213; *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 Atl. 70; *Nichols v. Mudgett*, 32 Vermont 543.)

The condition stated in the notice of suspension, that Cole purge himself of contempt, requires Cole to do the impossible. There is no provision for purging oneself of contempt of Congress.

Furthermore the alternative, that Cole be acquitted of contempt was beyond the power of the employer to exact. Although it cannot be doubted that Cole would seek to be acquitted, it did not lie within his power to determine whether he would or would not be acquitted. Furthermore, does the inclusion of this condition mean that if Cole is not acquitted, but is convicted, the suspension goes on forever?

For each of the reasons asserted, the suspension must be held to be void.

If the Court agrees with the foregoing, the appeal is disposed of. The asserted errors in the District Court's instructions and rulings on evidence are then immaterial because no issue of fact is presented.

II.

The Instructions Were Free From Error and in Any Event No Prejudice to Appellant Is Shown.

Appellant's argument (Appellant's Brief pp. 68-69) that one first in default cannot enforce a contract is an incomplete statement of a principle not applicable to the present appeal. The principle urged by appellant is valid in a case in which one has been guilty of a breach giving rise to a right to terminate the contract, and the other on being sued for his own default elects to assert the plaintiff's prior breach as a defense. But in the case at bar, appellant, far from terminating the contract, has purported to suspend appellee, and thus to assert a right under the contract itself. Appellant's argument therefore amounts to saying that appellant may look to the contract to derive a benefit from it, but appellee may not do so. That is not the law. One who acts in recognition of the existence of a contract is himself bound by it. (*United States Potash Co. v. McNutt*, 70 F. 2d 126 (C. C. A. 10, 1934); 17 Corpus Juris Secundum 929; *Goudal v. De-Mille Pictures*, 118 Cal. App. 407, 5 P. 2d 432.)

The effect of the foregoing principle is that appellant cannot rely on any breach or default by Cole as a defense to this action. Having elected not to terminate the contract but to assert a right which depends on the continued existence of the contract, appellant must rely on the effectiveness of the suspension.

The jury's determinations and the Court's findings each support the judgment, and therefore the claimed errors regarding instructions, even if found to exist, are without substance.

Although at the time of answering the appellant requested a jury trial on all of the issues, appellant receded

from this position and submitted requests for special verdicts pursuant to Rule 49(a). [R. 131, *et seq.*] The gist of the proposed special verdicts would have submitted to the jury the determination of whether Cole had violated the morals clause of his employment contract. The appellant submitted five such interrogatories, each asking whether the appellee had committed a specifically described act which, if found in the affirmative, would have constituted a breach of his employment contract. The Court gave the substance of these interrogatories to the jury, although it reduced the number to three. [R. 919.]

In addition to the special interrogatories requested by appellant, the Court submitted an interrogatory relating to waiver, the substance of which was requested by the appellee. [R. 920.]

All of these interrogatories were answered favorably to the appellee. This is to say that the jury found, first, that the appellee had not violated his employment contract and, second, that if he had, the conduct of the appellant constituted a waiver of the right to act on the breach. It is important to observe that these two determinations overlap. Even if only one stands, the judgment must be affirmed. If there has been no breach by the appellee the purported suspension was ineffective. And even if there had been a breach, Loew's had waived the right to suspend, and its subsequent purported suspension could only be ineffective.

It should further be observed that although it was the appellant who initiated the request for special verdicts, the appellant at the same time requested instruction which would have been appropriate only to the submission

to the jury of a general verdict. [See for example defendant's requested instruction No. 7, R. 128-129.]⁸

It is, however, important to bear in mind the fact that the jury was not requested to return a general verdict. The jury's duties were limited to answering the four special interrogatories. Accordingly, error alleged to exist in the charge to the jury is not worthy of consideration on this appeal unless it can also be shown that the error prejudicially affected the jury in determining the interrogatories submitted to it. (*Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Woolen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Board of Commissioners v. Bonebrake*, 146 Ind. 311, 45 N. E. 470.)

The Reference to the Law of Libel Was Carefully Directed to the Issue Submitted to the Jury.

The gist of appellant's argument under Specification of Error No. 12 (Appellant's Brief pp. 70 *et seq.*) is that the instructions relative to libel were abstract and irrelevant. The argument is unfounded. The language of the instruction selected by appellant for quotation in the brief does not fairly represent the charge, as we shall show. As given, the instruction itself was pertinent to the issues and directed the attention of the jury to the interrogatories. In these special interrogatories, submitted by appellant, the jury was asked to determine whether Cole's conduct in connection with the hearing was such as to bring or tend to bring Cole into public scorn or tend to shock the com-

⁸It is said in some authorities that to charge generally a jury which is directed to return a special verdict is improper but harmless. (See authorities collected at 5 C. J. S. 1137.) If any defect was thus injected into the proceedings, it was invited by the appellant.

munity. [R. 163-164.] One of the questions asked by the Committee was whether Cole was a Communist. In the light of current agitation concerning Communism it was not only relevant but necessary that the exact place in the case of Cole's politics be explained to the jury. The Court made it plain that its instruction arose from the question asked of Mr. Cole by the Committee. [R. 915.] The Court charged the jury that to call a man a Communist is to expose the person to scorn in the eyes of the public. This, indeed, is the very basis for appellant's defense, and if the instruction were in fact irrelevant, the error would be favorable to appellant.

However that may be the Court went on to explain:

"You are to bear these facts in mind in judging whether the conduct of the plaintiff was as charged by the defendant. And, in determining this matter you are to bear in mind the following facts and additional instructions." [R. 915-916.]

Thus the purpose of the instruction and its bearing on appellant's interrogatories were pointedly explained to the jury.

Appellant seeks to discover error in the charge that no one has proved Cole to be a Communist.

The appellant had repeatedly declared to the investigators and to appellee that it did not give a "damn" whether appellee was or was not a Communist; that it did not care what PEOPLE WROTE OR SAID about Mr. Cole's politics; that it was concerned only with Mr. Cole's work as a screen writer and that his work was excellent. The Court could therefore have given the jury instructions much more favorable to the appellee than those given, for the evidence as shown uncontrovertedly took the question

of appellee's politics out of the case. The appellee's own declarations on the subject amounted, at a minimum, to a practical construction of the morals clause as not including anything bearing on Mr. Cole's political affiliations, whatever they might be. The instruction, however, merely states that Mr. Cole's actual political affiliation was not an issue in the case.

"These principles should be borne in mind by you in considering the testimony in this case in which reference was made as to certain accusations made against the plaintiff in certain publications and before the Committee which were repeated and discussed in the presence of some of the defendant's representatives. You were admonished at the time when these accusations were repeated here and I admonish you again now that they are to be considered only as having been made and that no one has proved in this lawsuit that these accusations are true. Indeed, the truth of these accusations is not an issue in the case." [R. 916-917.]⁹

Furthermore, no prejudice appears. If the instructions were indeed irrelevant, they could scarcely affect the jury's clear determination of the special interrogatories. Reviewing courts will not lightly reverse for giving abstract in-

⁹Appellant's brief states:

"And then, as if to leave no doubt of this negation of defendant's theory of the case, the jury was told that the charge of Communism against plaintiff had not been proved. . . . In the context in which that sentence appears in the charge, it could have been taken as nothing else but a direction that the defense was without support in the evidence." (Appellant's Opening Brief, p. 73.)

s this intended to mean that appellant's justification for its attempted suspension was the alleged fact that Cole was a Communist? If so, nothing in the pleadings or in the record supports such a theory.

structions. (Compare *Beaver v. Taylor*, 68 U. S. 637, 17 L. Ed. 601, with *Johnson v. Jones*, 66 U. S. 209, 17 L. Ed. 117.) Appellant asserts that these instructions were prejudicial, but does not show in what respect or how, even if irrelevant, appellant was injured by them.

The Instruction Relative to the Legal Status of the Communist Party in California Was Free From Error.

The argument (relative to appellant's Specification of Error No. 12, Appellant's Opening Brief p. 74 *et seq.*) reveals the underlying strategy of the defense in the District Court. In this action on an employment contract brought by an employee whom appellant did not discharge but kept tied to it by suspension, appellant sought to try the Communist Party for advocating the overthrow of our government and for acting as agent for a foreign power. In suspending Cole, it did not charge him with being a Communist nor did it place the suspension on that ground. When first told by the Committee to fire Cole as a Communist it refused to do so because "the studio policy is we don't give a damn what people write or say about Mr. Cole's politics." When asked by Eric Johnston not to employ proven Communists it refused because "To do so was an illegal conspiracy, and so in its notice of suspension it charged Cole with having brought himself into public scorn."

The instruction here complained of was aimed directly at a determination of the issue submitted by appellant in the form of interrogatories. What was at issue was whether Cole's conduct before the Committee brought him into public scorn and contempt. The question was the state of public opinion in relation to Cole's conduct before the House Committee, not some determination by

jury after presentation of specially adduced evidence concerning Communists' aims and loyalties.

We respectfully submit it was the duty of the Judge to prevent this action on contract from becoming a forum for denouncing Communism and to prevent allowing the jury to become incited by reason of irrelevant political questions [see comments of District Judge, R. 616], particularly where as here appellant had repeatedly declared that it considered such political questions irrelevant to any of its private contracts with its employees.

The Court's instruction was not one of which appellant can complain. It dealt with the state of the law relating to Communists in California, and with declaration of judicial notice concerning that subject. (*McKekvey*, Evidence, pp. 58-64; *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97; *Stultz v. Cousins*, 242 Fed. 794; *Old Colony Trust Co. v. Welch*, 25 Fed. Supp. 45.) It indeed gave the appellant more than its own employment policies embraced.

There was no inconsistency between the rulings excluding evidence concerning the aims and purposes of the Communist Party and the charge dealing with the legal status of the Communist Party and telling the jury that to call a man a Communist was libelous *per se*. The rulings on the evidence and the instructions to the jury were strictly consistent not only with each other but also with the grounds of suspension framed by appellant. Having chosen to suspend (or to seek to suspend) because of the effect of Cole's conduct on the public, it was proper to forbid presenting to the jury special evidence concerning the principles and policies of the Communist Party; the reaction of the public should be based on common knowledge, not on proof of particulars known or claimed to be known by an "expert."

What a court of last resort had said, which was what the instructions covered, was in the public domain and might be considered in determining the state of public opinion.

Appellant further argues that the Court should have instructed the jury that membership in the Communist Party constituted a violation of the Criminal Syndicalism Act. But no decision holds that such membership violates the law. The Court's instructions were properly limited to the state of the declared law as of the time of plaintiff's conduct. A determination in 1948 as to the Communist Party could not possibly affect public opinion in 1947, when the declared law was stated in *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333; *Bridges v. Wixon*, 326 U. S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443, and *Communist Party v. Peek*, 20 Cal. 2d 536, 127 P. 2d 889 (1942).

The Pre-Trial Order Did Not Preclude the Court From Charging the Jury Concerning Facts Stipulated by the Parties.

Appellants argue it was error to submit to the jury the interrogatory relating to waiver, on the ground that the pre-trial order did not state that such an issue remained for determination. (Appellant's Opening Brief p. 78.) We respectfully submit that the argument is unfounded.

The pre-trial order contains the following stipulations of the parties:

“(K) Plaintiff well and truly performed all writing services required of him until on or about December 2, 1947.

(L) Defendant Loew's Incorporated well and truly performed each and every obligation of said agree-

ments on its part to be performed until December 2, 1947.

(M) On or about December 2, 1947, defendant Loew's Incorporated delivered to plaintiff a certain written notice, a copy of which is attached hereto and marked 'Plaintiff's Exhibit 3.' Since the delivery of said notice neither plaintiff nor defendant Loew's Incorporated has rendered any performance under said agreement; but plaintiff has been and is ready and willing to render his said services.

(N) On October 30, 1947, plaintiff Lester Cole appeared as a witness. . . ." [R. 78-79.]

Thus the principal facts forming the basis for the waiver were in evidence by stipulation, that is, without objection on the part of anyone. Appellant apparently concedes there was no conflict in the evidence on the question of waiver.¹⁰ This being so, it was necessary and proper for the Court to instruct the jury as to the effect of this evidence.

For their argument appellants seek support in an analogy between a pre-trial order and the pleadings. But if this analogy is good, then appellant's argument is destroyed, because F. R. C. P., Rule 15(b) permits issues outside the pleadings to be tried, even without amendment of the pleadings, and this has been applied in an action by an employee on a contract of employment. (*Lientz v. Wheeler*, 13 F. 2d 767; see also *Franklin v. Columbia Terminals*, 50 F. 2d 767; *Low v. Davidson*, 113 F. 2d 364.)

None of the decisions cited by appellant as to the effect of a pre-trial order holds that a Court cannot submit to

¹⁰"Since there was no dispute in the evidence over the facts assumed in this instruction, it amounted to a direction to return a verdict for the plaintiff." (Appellant's Opening Brief, p. 80.)

a jury or itself determine an issue unless it has been specified in a pre-trial order; the decisions merely hold that it is no error if a Court declines to do so. In effect, a trial court in the exercise of its discretion may bind the parties by the pre-trial order; but the pre-trial order is not binding on the Court. Indeed, in this very case, the interrogatories submitted by appellant contained substantial departures from the letter of the pre-trial order.

Furthermore, Rule 16, on which appellant relies, does not go so far as to require or permit a statement in a pre-trial order of what issues remain for determination. The meaning of Rule 16 is just the contrary. It is to *dispose* of those issues concerning which agreement is had or admissions are made. The rule provides that the Court's pre-trial order may "limit the issues for trial to those not disposed of by admissions or agreements of counsel." This of course is different from specifying the issues to be determined at the trial. Thus, all issues not disposed of and otherwise relevant to the controversy remained to be determined by the trial. To hold otherwise would be to handicap the conduct of a trial unwisely and unnecessarily.

The Court of course has power to *modify* a pre-trial order at the trial. (Rule 16.) It is of some importance to note that while Rule 15(b), in dealing with the pleadings, uses the word "amendment," Rule 16, in dealing with a pre-trial order, employs the concept of modification. Nothing in the rule requires this modification to consist of an amendment to the order itself. The order of the District Court submitting to the jury the issue of waiver was, in effect a modification of the pre-trial order.

(See *Jos. Riedel Glass Works v. Keegan*, 43 Fed. Supp. 153.) It would be ritualistic to hold as error a failure to amend the pre-trial order itself; and in view of the stipulation by the parties to the facts themselves, no surprise or prejudice is conceivable.

The Jury Was Properly Charged Relative to Waiver.

Appellant asserts that the instructions concerning waiver were erroneous because "retention of an employee" for a short time does not amount to waiver "even when done with knowledge by the employer of the employee's misconduct." (Appellant's Opening Brief, p. 80.) The argument is without support in the record, because the Court's charge went significantly further. The Court instructed the jury it could find a waiver if Loew's "put him [Cole] back to work, and accepted his services *with the intention of accepting Cole as its employee under the employment contract.*" [R. 910, emphasis added.] The authorities cited by appellant are not in point, because they deal with the time allowed the employer for investigation before reaching the conclusion to condone or not to condone misconduct. Furthermore, language substantially identical in effect with the instruction complained of has been approved.

In re Nagal, 278 Fed. 105;

Goudal v. De Mille, 118 Cal. App. 407, 5 P. 2d 432;

Leatherberry v. Odell, 7 Fed. 641;

and see:

56 C. J. S. 433.

Having once condoned the misconduct, Loew's could not thereafter rely on it. (*In re Nagal*, *supra*, 110.)

The jury was charged that a waiver must be intentional [R. 910.] Intention, of course, can be known only by its manifestations, and may even be inferred from circumstantial evidence. (*Majestic Securities Corp. v. Com'rs* 120 F. 2d 12, C. C. A. 8.) The jury was charged that a waiver was "such conduct of the employer as shows his election to forego the right to suspend." [R. 910.]

The argument (Appellant's Opening Brief p. 85) relating to estoppel and to waiver *in futuro* and to amendment of written contracts is based on a misconception. No waiver *in futuro*, amendment, or estoppel is involved.

It is true that the right to suspend could not arise until after the alleged misconduct occurred. It is not the law, however, that it could not be waived in advance. (See 3 Williston Contracts, Section 689, pp. 1987 *et seq.*)¹ But in any event so far as the waiver of the right to suspend is concerned, the instructions dealt explicitly with the situation after the testimony. [R. 909-910.]

It was however proper for the Court to charge the jury concerning the effect of the evidence dealing with the situation prior to the Washington hearings. Conceding for the purpose of argument that Loew's could not in advance waive its right to suspend, it could of course waive its existing and continuing right to exact performance in a particular manner by Cole of his duties under the contract. Anyone entitled to performance, or to

¹¹"Wherever the promisee has allowed a legal excuse to arise, relying upon express or implied statements of the promisor that the latter would not avail himself of the excuse, there is waiver. This is a principle distinct from the ordinary equitable estoppel, since the representation is promissory, not misstatement of an existing fact." (*Ibid*, p. 1989.)

particular kind of performance, may give it up either by an express statement to that effect or by conduct which says the same thing. (California Civil Code, Section 511(3); 3 Williston Contracts, 1958; Rest., Contracts, Section 88, comment (c).) This is the meaning and application of the Court's instructions dealing with the time before the hearings. [R. 9-7-908.] These instructions go, not to the question whether there was a waiver of the right to suspend because of Cole's misconduct, but to the question whether there was any misconduct. Certainly if Cole had been led to believe that his employers permitted him to act as he thought proper, his behavior would scarcely give rise to contractual rights based on misconduct. The Court made it perfectly clear that this was the meaning and application of the instruction.

"An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligations as an employee.

"If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations." [R. 907.]

The Court's instructions are admirably arranged in chronological order, dealing first with the period before the hearings, with the right of Loew's to instruct Cole as to his behavior in Washington [R. 909], and finally with the period after the hearings. [R. 910.] All of this was directly relevant to the interrogatories.

Appellant's Misconception of the Instructions Pervades Its Argument (p. 88) That the Instruction Excluded Justification for Plaintiff's Belief.

The instruction dealing with the situation prior to the hearings was pointed, as we had said, to the question whether there was a breach at all. The statements of Mr. Mannix and Mr. Mayer to the representatives of the House Committee concerning their official view of Mr. Cole's alleged political affiliations and the effect of that affiliation upon his employment by Loew's were admissible to show that the parties never contemplated that the act complained of by the employer on December 2, 1947, was of the kind which would give rise to the right of terminating compensation or employment under the "morals clause." Thus it was not necessary to instruct the jury on the ingredients of estoppel.¹² *Parker v. Funk*, 185 Cal. 347, 197 Pac. 83; *Amer. Nat. Bank v. Somerville*, 199 Cal. 364, 216 Pac. 376, and *Griffith v. Brown*, 76 Cal. 266, 18 Pac. 372, all deal with questions of estoppel, not with waiver, and are therefore not in point.

Since these instructions were pointed to the question whether there was a breach of contract, the Court asked the jury to consider all of the facts and statements of the company's executives. [R. 908.] Furthermore the instruction covered the question whether appellee had been given notice of any change in appellant's attitude, thus giving appellant the benefit of anything at all that occurred before Cole testified which he could interpret as appellant's withdrawal of any consent it had previously

¹²No interrogatory relating to estoppel was given to the jury. Therefore, even if the instruction was deficient in some respect (which we insist it was not), the special verdicts of the jury on other subjects were unaffected.

given. Implicit in this phrase of this instruction, "but that the defendant's executives *changed their minds*"¹³ is the factor of intentional behavior on the part of appellant. Thus the point contended for by appellant was fully and elaborately covered by the charge.

Appellant further urges that the instruction should have included language requiring Cole to have acted on reasonable grounds in coming to the conclusion that he could conduct himself as he in good faith thought proper. But an employee has the right in good faith to select one meaning of an ambiguous instruction without fear of his job. (*Park Bros. v. Bushnell*, 60 Fed. 583, 24 LRANS 24n) Furthermore there was not the slightest evidence that Cole's conclusion could have been unreasonable, and a charge submitting such an issue would have been superfluous. Even if it be contended that there was evidence on the basis of which Cole might have concluded that

¹³Or, to put it differently and more explicitly: If you find that the defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist, and gave him no specific instructions as to how to conduct himself in the matter—and Cole, in good faith, relied on such statements and actions in deciding upon the line of conduct before the Committee—but that the defendant's executives afterwards changed their minds, without notifying Cole before he testified before the House Committee, and without giving him any specific instructions as to how to act, then I instruct you that Cole had the right to pursue the conduct he had decided upon on the basis of the prior acts and statements referred to, if you find them to be true and to have existed, without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist. [Tr. & Rec. pp. 908-909.]

he would be fired if he failed to deny being a Communist¹⁴ (and in the light of the record such a conclusion is wholly unwarranted), it is obvious that there was nothing from which it might be argued that a contrary conclusion on Cole's part was unreasonable. Indeed a review of the record shows that only the most tortured construction of the evidence by a process unreasonably generous to appellant's contention could wring out any grounds on which it would be logical for Cole to conclude that his employment status would be injured if he conducted himself as in fact he afterwards did. But even this is far from making an issue on the question whether Cole's conclusion was unreasonable. The most appellant can point to is Johnston's testimony that he personally (not as Cole's employer) would not employ one Lawson, another witness who testified, if it turned out to be true that Lawson was a Communist. (Appellant's Opening Brief, p. 90.) But that this whole strain of reasoning is an afterthought, and that there was in fact no ground on which Cole could conclude that his employment would be jeopardized by his politics is conclusively shown by the fact that his politics was not at any time referred [and see Mr. Mayer's testimony R. 362] to either as a ground of *caveat* nor as a ground of the suspension.

The Court charged the jury that Loew's had the right to instruct Cole and that it was Cole's duty to follow reasonable instructions. Appellant complains of this instruc-

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ion saying it amounts to directing the jury that plaintiff could act in contravention of the morals clause. (Appellant's Opening Brief p. 91.) The instructions themselves answer this argument. The Court did not instruct the jury that Cole had the contractual right to refuse to answer questions, and appellant's statement to that effect (Appellant's Opening Brief p. 91) is not in accord with the record. [R. 908-909.] The Court pointed out that Cole was bound by the contract to obey reasonable instructions, and that Loew's had the right to give instructions governing Cole's conduct when he got to Washington. Surely this was at least a generous interpretation, favorable to Loew's, of its powers under the employment contract. The Court did not charge the jury as to what inference the jury might draw from appellant's failure to give Cole such an instruction. Appellant's statement that this instruction told the jury that Cole could do as he pleased is without any support in the record. It is true that an inference could be drawn from Loew's failure specifically to instruct Cole, but this derives from the facts of the situation, not from the Court's instruction. Appellant's quarrel is with the undisputed fact, that is, Loew's did not specifically instruct Cole how to conduct himself in Washington.

There was no charge whatever dealing with the effect of Loew's failure to give specific instructions. Appellant's argument that Loew's had a right to presume that Cole's conduct would be lawful and thus was under no duty to give the instruction is not addressed to anything in the record.

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The Instructions Were Carefully Balanced and Gave No Undue Prominence to the Theories of Either Party or to Any Specific Evidence.

It should be borne in mind that the Court at no point in the instructions complained of purported to state or to summarize the evidence. Authorities like *Sperber v. Conn. Mutual*, 140 F. 2d 2, are therefore not in point. Further, the Court did not comment on the evidence, but made it plain to the jury that it had no intention of doing so. [R. 893.] *Allison v. U. S.*, 160 U. S. 203, 16 S. Ct. 252, 40 L. Ed. 395, dealing with an aggravated case of judicial commentary amounting to "forensic ardor" is therefore not applicable. Furthermore, the District Court did not select any single act or evidence for particular comment, as was done in *Palmer v. Miller*, 145 F. 2d 926. Nor were the instructions "incomplete and inadequate" and "calculated to mislead," as was the case in *Weiss v. Bethlehem Iron Co.*, 88 Fed. 23, 29, 30.

It is proper for a Court to refer and detail evidence bearing on a particular issue (*Giacomini v. Pac. Lumber Co.*, 5 Cal. App. 219, 89 Pac. 1059) or even to set out evidence which, if believed, would be of controlling importance (*Berthold v. Danz*, 27 S. W. 2d 448); nor is it error to state or to call attention to particular facts (numerous authorities collected at 64 C. J. 690, footnote 15) or to refuse to state in detail evidence relating to a particular theory of the case. (*O'Conner v. Ludlam*, 92 F. 2d 50.) The fact is that the Court charged the jury fully on Cole's duty as an employee [R. 905-907] before touching on the question of waiver. Nothing in the latter instructions selects any evidence for undue prominence. Indeed in referring to the undisputed fact that Mayer and Mannix did confer with Cole relative to the Washington

hearings, the Court was so cautious as to leave it to the jury to find whether the conferences occurred. [R. 908.] Of course the Court's reference to Mayer's statements to Cole in those conferences, to which the Court specifically referred in its instructions, included the very testimony which appellant now asserts was omitted from the instruction, and it was only Mayer's and Mannix' statements which the plaintiff testified he relied on. Johnston, whose testimony appellant contends should have been referred to in the Court's instruction, was obviously speaking for himself, not for Loew's. [R. 508.] With regard to Mayer's testimony before the Committee, the Court left it to the jury to determine whether Loew's changed its mind before Cole testified and if so, whether Cole had notice of it. [R. 908.]

In the light of the admitted testimony of Messrs. Mayer and Mannix with respect to the employer's official position on the very subject matter which the employer now contends justifies its suspension, the Court could have gone much further and commented on the complete absence of any substance justifying the suspension imposed on December 2, 1947. But the Court did not do so. Instead it presented appellant's position to the jury in a light much more favorable than the appellant's undisputed conduct justified.

Finally the appellant made no request for any instruction on the issue of waiver and can scarcely be heard to complain that its theory was not presented.

The Instructions Relating to the Plaintiff's Conduct Were Free From Error; in Any Event Appellant Has Waived the Point.

After the Court had instructed the jury the appellant objected to a portion of it, including the charge that the jury must determine the effect of plaintiff's conduct [R. 901]; the objection was: "Our objection to that particular instruction is that it requires the defendant to show that the conduct had the effect and not merely, as the contract provides, that it had the tendency to produce that effect." [R. 924.] "I just wanted to say that the same objection recurs throughout other parts of the charge and in Question 1, the proposed special verdict." [R. 925.] The Court yielded to the objection and after the jury was brought back said:

"As a result of the conference between counsel and the Court, some instructions have been modified and I will reread them to you in the modified form

. . .

"In the main instructions I defined certain words, giving you their meaning and stating to you that it is for you to determine, from all the evidence, whether the conduct of the plaintiff had the effect or *tended to have* the effect set forth in the notice which was based on the Clause 5 of the contract, which has been referred to as the morality and public conduct clause.

". . . In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to—namely, his appearance before the Congressional Committee—was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or *tend to* shock and offend the community

and/or brought the plaintiff or *tend to bring* the plaintiff into public scorn, hatred or contempt as herein defined.

“ . . . In this case, the defendant having notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself or tend to bring himself into public scorn, hatred, contempt or ridicule, or shock or offend or *tend to shock* or offend the community or prejudice the defendant or the industry in general, they must show, and you must be convinced by a preponderance of the evidence that such was the case, before you answer the first three questions propounded to you in the affirmative.

“ . . . Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt, or ridicule, or to shock the community or prejudice the defendant, or that the conduct had such tendency, you must find, from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had or *tended to* have that effect, was wilful and intentional.” [R. 955-957.] (Emphasis added.)

Thus the Court repeatedly informed the jury it had modified the instructions, and made the correction not less than four times.

Thereafter and before the jury retired to consider its verdict the Court called for “any additional exceptions which are not already in the record.” [R. 962.] Appellant responded, “We have no additional ones, your Honor.” [R. 962.]

The point made in appellant’s opening brief (p. 101), even assuming it to be good, was therefore waived. Ap-

pellant said nothing, even though invited to do so by the Court, about inconsistency or lack of clarity. Any such statement in the District Court would have been preposterous in the face of the fourfold correction. The record therefore discloses no objection at this point nor any grounds for criticisms. The point now argued, whatever its merit otherwise, was therefore waived. (Rule 51; *Krug v. Mutual Benefit Health*, 120 F. 2d 296; *Shevlin-Hixon Co. v. Smith*, 165 F. 2d 170.) Indeed the rule is of such force that because of the "absence of exceptions in the respect complained of, nothing is here for review." (*Grand River Dam Authority v. Thompson*, 118 F. 2d 242; to like effect is *Thiel v. Southern Pacific*, 149 F. 2d 783, 788.) (Emphasis ours.)

Furthermore the argument is misconceived. The District Court informed the jury clearly that the instructions had been modified, and appellant's search for inconsistency is unfounded. The jury was instructed that in answering the special interrogatories they should determine whether plaintiff's conduct shocked or tended to shock the community or brought or tended to bring the plaintiff into scorn [R. 955-956]; they were told that the defendant's notice of suspension was based on defendant's charge that the plaintiff's conduct brought or tended to bring him into scorn or shocked or tended to shock the community. [R. 956-957.] Thus there was no inconsistency between the instructions and the interrogatories. It is true the modified instructions differed from the original, but this is the very purpose of Rule 51. If there was any error, giving the modified instructions cured it. (*Lake v. Mudgett*, 252 Fed. 359 (C. C. A. 6, 1918); *Emmons v. Lehigh Valley* 223 Fed. 810 (D. Ct. N. Y.); *Francis v. Seas Shipping*

Co., 158 Fed. 584 (C. C. A. 2, 1946); *Tonner v. Spears-Wells Machinery Co.*, 126 Cal. App. 763, 14 P. 2d 1051.)

Appellant further argues that Loew's was not limited to the grounds stated in the notice of suspension but included the right to suspend for conduct which *tended* to shock the community. This point has become moot so far as the instructions are concerned because the Court adopted appellant's theory. In any event the contention that Loew's could give a notice stating the grounds of *suspension* (not termination) and then rely on grounds other than those stated is bad. It is an iniquitous theory, and none of the decisions cited by appellant supports it. Authorities dealing with justification for *discharge* are not in point.

Even in the case of a discharge, employers who have specified the grounds for discharge have been held to those stated. (*Mortimer v. Bristol*, 180 N. Y. Supp. 55, 190 App. Div. 452; *Kiker v. Bank*, 27 N. M. 346, 23 P. 2d 366; *Vicknair v. Southside Plantation Co.*, 10 La. App. 43.)

But suspension is different from discharge or termination. An employer always has the *power* to terminate, even though to do so may subject him to damages; and it is probably true that the *right* to discharge may exist as a reserved right, without the necessity of express provision therefor in a contract of employment. The right of suspension exists only by virtue of contract, and then only under the conditions specified. But for the contract

permitting a suspension of payment, an employer who should refuse to pay salaries at specified intervals would be guilty of a misdemeanor. (Cal. Labor Code, Sections 204, 215.)

Termination or discharge leaves the employee free to seek a livelihood elsewhere. Suspension or refusal to pay salaries, as in the present case, would render the employee powerless to earn a living anywhere during the period of the suspension. The situation is aggravated by the right given the employer to extend the term of the contract for the period of the suspension. For these reasons, as we have shown, suspension for a breach can only be for one which it is within the employee's power to remedy. To argue that an employer can specify certain grounds of suspension and then rely on others is to urge a gross injustice. The employee could be put in the position of curing the defects specified only to be told that these were not what his employer had in mind, or perhaps not all of what his employer meant; and under the contention appellant urges, the employee need never be told what the grounds of the suspension are; and the employer may continue to extend the term of the contract. We do not think such a contention commends itself for acceptance to any Court.

The famous doctrine in *Ohio and Miss. Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693, is applicable here:

“Where a party gives a reason for his conduct and decision touching anything involved in a controversy

he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

And the rule in California is settled that a specification of certain grounds constitutes a waiver of all others. (See for example, *Kofold v. Gordon*, 122 Cal. 314, 54 Pac. 1115; *Hoover v. Woolfe*, 167 Cal. 337, 135 Pac. 794; *Ray Thomas, Inc. v. Cowan*, 99 Cal. App. 140, 277 Pac. 1086.)

**The Charge Relative to the Rights of Witnesses Was Relevant,
Not Prejudicial.**

Appellant's argument in support of its Specification of Error No. 11 is founded on a misconception. Appellant's argument supposes that in order to be relevant an instruction must deal specifically with the very issue to be decided by a jury, and that if the instruction deals with other matters it is irrelevant. This is not the law even in those cases in which the jury is called on to render a general verdict. It is more plainly a misconception in the present case, in view of the fact that the jury was called on merely to answer four interrogatories.

Appellant's letter notifying Cole he had been suspended [Ex. 3, set out at R. 174] stated that Cole had refused to answer certain questions addressed to him by the House Committee, and that by his failure to answer those questions and by his statements and conduct before the Committee and in connection with the hearings he had violated

the morals clause. Thus the supposed justification for the suspension, which appellant asserted, pointed almost exclusively to Cole's conduct as a witness before the Committee. Surely there could be no closer relevance to the subject of appellant's justification and to the issues of the case than were the subject matters of the very instructions complained of.

It is not the law that instructions must be limited to those instructions which, on being answered Yes or No, determine the question. It is the proper function, if not the duty, of the trial judge, to inform the jury by his instructions of so much of the law as is relevant to the issues and as will assist the jury in a general understanding of the facts. (*Jennings v. Arata*, 83 Cal. App. 2d 143, 146, 188 P. 2d 260; *James v. Meyers*, 68 Cal. App. 2d 23, 156 P. 2d 69.) To argue otherwise would be to condemn, for example, general instructions dealing with the credibility of witnesses in cases where no witness has been impeached, or the nature of the evidence, or in appropriate cases of the fact that an accident occurred on a street which was a public highway, and the like.

Appellant's argument that the court's instructions concerning legislative hearings "tended to divert the jury from the real issue" and permitted the jury to frame their answers to the interrogatories on a false basis, is without support in the record. Nothing in the instructions told the jury that it was to answer the interrogatories on the basis of Cole's rights before the Committee. The court's instructions relative to answering the interrogatories [R]

918, *et seq.*] dealt solely with the questions in the interrogatories themselves.

Appellant next argues that whether plaintiff's conduct before the Committee was lawful was a question of law, not one of fact. It is unnecessary to argue this beyond the point of saying that the jury was not directed to determine the question. As a matter of fact appellant itself urges that the question of contempt was not in the case. This the court recognized, and did not submit that question to the jury for its determination.

Appellant further argues that the court instructed the jury that Cole's conduct was lawful if it were motivated by a desire to procure a judicial determination. This argument is a distortion of the record. The court plainly told the jury that the Committee was legally constituted and that it had the right to ask the questions which it did ask. [R. 911.] The court commended the process of legislative inquiry. [R. 911.] Further the court laid down the test, admittedly proper, for contempt. [R. 912-913.] In saying that a witness may decline answering certain questions in order to secure a determination of the courts, the jury was instructed that when a witness does so "he paves the way for contempt proceedings in the courts." [R. 911.]

We respectfully submit that this is a correct statement of the law. Furthermore, in view of appellant's argument that the question of contempt was not an issue in the case, this instruction sufficiently covered the facts in the case.

**The Jury Was in Fact Instructed as to the Attitude Toward
Communism of the American Public.**

Appellant complains that the court failed to instruct the jury that the American public look with scorn on Communists and Communist sympathizers. (Specification of Error 13; App. Op. Br. p. 106.) The substance of Defendant's Requested Instruction No. 7, to which this Specification of Error relates, is that the courts will take judicial notice of the fact that "many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and politics." [R. 101.] The exact objection to the court's failure to give this instruction was as follows: "We will object to the refusal to give defendant's requested instruction No. 7." [R. 922.] It is important to keep in mind the stated objection because as a matter of fact the court did give the substance of the instruction.

The court instructed the jury that "In California it is libelous to call a person a Communist. This, for the reason that such a charge would expose a person to the hatred, contempt and ridicule of many persons." [R. 915.] The court further instructed the jury:

"In California an accusation of Communism against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided . . . is libelous, *per se*." [R. 916.]

At another point in the instructions the court referred to a charge of Communism as one "of a character to affect his reputation." [R. 916.] As far as the substance of the Defendant's Requested Instruction No. 7 is concerned, the instructions actually given completely cover the same subject matter and in the same way.

So long as the substance of a requested instruction is given to the jury, or so long as the purpose of the requested instruction is accomplished by other instructions, there is no cause for complaint. (*Short v. Tarmer*, 260 Mass. 102, 156 N. E. 735.)

The remaining objections quoted by appellant under this same head (Appellant's Opening Brief, pp. 107-109) are not before this Court. Since the grounds of those objections were not stated in the District Court, there is nothing here to review. See authorities cited under heading "*The Instructions Relating to the Plaintiff's Conduct Were Free From Error; in Any Event Appellant Has Waived the Point,*" *supra*.) In any event, the arguments are not well founded. The jury was told several times, as a fact, that the American public held Communists in contempt, nor were the Court's instructions limited to membership in the Communist Party. On the contrary, the Court referred to an "accusation of Communism," which carries with it every degree of sympathetic acceptance of the doctrines of that political party or political philosophy.

III.

The Trial Court's Rulings on Evidence Were Free From Error.

The Exclusion of the Conduct of Other Persons Was Proper.

Under Specification of Error 1, appellant has sought to preserve for review the Court's exclusion of a question [R. 651] and the Court's exclusion of motion picture films. [R. 721, 731.]¹⁵

The excluded question was whether Cole *knew* that one Lawson (not a party to this action, not an employee of Loew's, and a stranger to the employment contract) intended to read a prepared statement when called as witness before the House Committee. The films would have shown the conduct of nine persons other than the plaintiff, while testifying at the Committee hearings.

The exclusions were proper.

Appellant does not argue that Cole's *knowledge* of whether Lawson intended to read a statement was relevant to any of the issues. Since this was the gist of the question, the failure to argue the point constitutes a waiver. *Zap v. U. S.*, 151 Fed. 100 (C. C. A. 9), *aff'd* 328 U. S. 624, 90 L. Ed. 1477, 66 S. C. 1277; *Stetson v. U. S.*, 155 F. 2d 359 (C. C. A. 9), and see *E. K. Wood Lbr. Co. v. Moore Mill etc. Co.*, 97 F. 2d 402 (C. C. A. 9).)

Appellant treats the exclusion of this question under the same heading as the excluded films, that is, as evidence

¹⁵No other offers are included in this Specification. Appellant did not offer to read the transcript, although this was discussed by the court and counsel. [R. 828.] However the reply made to the other arguments would sufficiently dispose of an offer to read the transcript, if one had been made.

showing the conduct of others. This is, of course, unfounded, because the question deals with Cole's foreknowledge; the films deal with the behavior of others. The failure to make an offer of proof is essential where the significance of the proffered evidence is not clear. (*Hoffman v. Palmer*, 129 F. 2d 976, 994.) But even assuming this question to seek no more than evidence of the conduct of others, the exclusion was proper because it was proper to exclude evidence of the conduct of others.

The Proffered Evidence Was Not Relevant.

Appellant's first argument is based on the reasoning behind California Code of Civil Procedure 1854. Appellant urges that since the joint policy statement was put in evidence, and since the statement referred to the conduct of others, the Court should have permitted appellant to show what that conduct was. But neither the California Code Section nor the reasoning behind it supports appellant's contention. The Code section was never intended to compel the reception of irrelevant evidence. (*John Bruener v. King*, 9 Cal. App. 271, 98 Pac. 1077; *People v. Girotti*, 67 Cal. App. 399, 227 Pac. 936; *Mills v. Rosenthal*, 90 Cal. App. 390, 405, 266 Pac. 320; *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027.) Indeed, the California Supreme Court has said:

"Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of

the parties, and would have little, if any, proper weight with the jury, the trial court if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence” (*Avery v. Wiltsee*, 177 Cal. 484, 487, 171 Pac. 95, 96.)

In the present case, the combined action of the employers themselves in forever banning from their employ a number of persons at the same time and by the same paper which banned the plaintiff can offer no justification for bringing in the controversies between those other persons and the motion picture industry.

The other asserted ground for reception of this evidence is even less tenable. First, the notice of suspension stated it was based on Cole's conduct; no reference was made to the conduct of others. The employer therefore cannot justify on other grounds.

Furthermore, having in mind that Loew's chose to suspend, not to terminate, and that a suspension under the contract can only be for Cole's failure to comply with his contract, the conduct of others is clearly irrelevant.

Again, since a suspension can only be for inaction or for omission or for a breach which is remediable by the employee, how can it be argued that the past conduct of other persons is even remotely relevant to the issue of appellant's justification?

The argument of appellant that the conduct of ten persons would be more likely to create public indignation than

would the conduct of one is not applicable to appellant's rights under the contract.

If remaining in public favor were a condition of Cole's continued employment it would have been necessary for appellant to show only that Cole was held in public contempt. But this contract was not so drawn. Here to justify the suspension appellant must show such conduct on the part of plaintiff himself as to constitute a breach of his obligations under the contract, not merely the attitude of the public.

We respectfully submit that on the merits and without regard to the state of the record, the exclusions were eminently proper. No rule or reason requires the reception of the evidence. And to have permitted appellant to try the conduct of nine other persons would have transformed this contract action between a single plaintiff and a single defendant into a mass trial, and the issues as they relate to the plaintiff and to the defendant would have been buried beneath nine layers of irrelevant controversies.

Beyond this, even if the evidence were otherwise admissible, it was proper for the Court to exclude until a satisfactory preliminary showing had been made. Before the reception of evidence tending to charge one with the conduct of another, as for example in cases of conspiracy or agency, it is within the discretion of the trial Court, and it is better trial practice, to require satisfactory evidence of the agency. (*First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. Ed. 283; *Globe and Rutgers Co. v. King Foong, etc.*, 18 F. 2d 6, C. C. A. 9; *Buckley v.*

Christmas, 121 F. 2d 323, C. C. A. 4, cert. den. 314 U. S. 679, 62, S. Ct. 180, 86 L. Ed. 543; *Feigenbutz v. U. S.*, 65 F. 2d 122.) Indeed it has been held reversible error to receive evidence of conspirators' acts before the conspiracy has been established. (*People v. Walther*, 27 Cal. App. 2d 583, 81 P. 2d 452; *People v. Doble*, 203 Cal. 510, 265 Pac. 184.

Whether there has been a sufficient showing of a conspiracy to permit reception of testimony of co-conspirators lies within the discretion of the trial Court. (*Kelley v. State*, 210 Ind. 380, 3 N. E. 2d 65; *State v. Moore*, 217 Iowa 872, 251 N. W. 737; and see 16 C. J. 654.) That discretion will not be questioned unless it is abused. (*Antonio Pepe Co. v. Apuzzo*, 89 Conn. 807, 120 Atl. 681.) A high degree of proof of the conspiracy is essential if the issue is tried to a jury. (*Hobbs v. State*, 86 Ark. 360, 111 S. W. 264; *Miller v. State*, 139 Wisc. 57, 119 N. W. 850.)

No conspiracy or other agreement to act in concert was shown. The casual reference in the testimony of a single witness to an admission made out of Court to him by Cole [R. 362] is too trivial to constitute substantial evidence. Even that testimony does not purport to show any agreement by Cole, and if it be assumed that the evidence was offered for that purpose (which could not have been guessed by anyone at the time of the trial) it was within the trial court's discretion to hold that it was insufficient as a foundation to charge Cole with the conduct of others.

Evidence of the Public Attitude Toward Communism and Testimony by the Unqualified Witnesses of the Public Opinion Toward Cole's Conduct Were Properly Excluded.

Specifications of Error Nos. 2 and 3 relate to several kinds of evidence which it is impossible fairly to consider under a single heading.

One of the questions excluded was addressed to Mr. Mayer, a witness not shown to be qualified as an expert on the subject of public opinion. The question he was asked did not deal with Cole alone. He was asked his "observation of public opinion with reference to the *hearings*. And particularly to *that portion of the hearings* in which the questions were asked by the Committee and not answered by *certain of the parties*, including Mr. Cole?" [R. 357-358.]

The question was, therefore, much too broad, and was objectionable on that ground alone. It would have brought before the jury the public reaction not toward Cole, but toward the hearings themselves, an issue remote from the rights and obligations of the parties under the employment contract. The portion of the question dealing with questions not answered was likewise directed to the hearings. And in any event it called for public reaction to the conduct of *all witnesses*, whoever they may have been, who failed to answer any questions. Most generously construed, the question was subject to the same defects as was other offered evidence of the conduct of persons other than the plaintiff. It was plainly irrelevant.

Furthermore, the witness was not shown to be qualified to state "his observation of public opinion." Note, the question did not call for a specific comment by specified or ascertainable persons. It called for "public opinion."

The distinction is important. What Jones or Smith or Robinson said or did is an observable fact. Whether they or any given number of persons or any particular selection of individuals represent public opinion is not an observable fact, but is a matter of opinion. Even to ascertain what is meant by the phrase "public opinion" calls for the judgment of experts in an elusive and treacherous field of study. For example, was Mr. Mayer qualified to say what percentage of a community is "the public"? Even after determining what the phrase means, the work of ascertaining the state of public opinion on a given subject requires, as is well known, extensive field work, careful coordination of data, application of statistical mathematics and the calculus of probability.¹⁶ The witness was not shown to have any such qualifications.

Another ground of exclusion was the fact that no proper foundation had been laid, or was offered, for the question asked. [R. 358.] Before even an expert may give an opinion, the Court may require evidence in the record of facts on which the opinion is based. (*Commercial U. S. Co. v. Pacific Gas & Electric Co.*, 220 Cal. 515, 31 P. 2d 793; *Hornby v. State Life Insurance Co.*, 106 Neb. 575, 184 N. W. 84.) An expert is not permitted to base his opinion on any source other than the evidence in the case. (*Atlantic Life Insurance Co. v. Vaughan*, 71 F. 2d 394, C. C. A. 6 (cert. den. 293 U. S. 589, 79 L. Ed. 684), 55 S. Ct. 104; and *cf. United States v. Burns*, 69 F. 2d 636, C. C. A. 5.)

¹⁶Even so, the results have notoriously been found to be so grossly inaccurate that it may well be argued that public opinion is beyond the testimony even of experts.

For each of these several reasons question addressed to Mr. Mayer was properly excluded.¹⁷

The claimed error in excluding the editorials is wholly unfounded. The editorials were never offered. There was, therefore, nothing before this Court to review. (*Hagen v. Porter*, 156 F. 2d 362 (C. C. A. 9, 1946), cert. den. 67 S. Ct. 85 (1946); *Patten v. Lewis*, 146 F. 2d 544.)

The Court did not at any time directly rule or even indicate it would exclude the editorials. Referring both to the editorials and to motion pictures the Court said:

“ . . . I say now that I am satisfied . . . that the editorials cannot be shown.

“There is one additional thought, and I am *not* ruling definitely on it. I am giving my additional thought to it. . . .” [R. 823.]

And in the discussion that followed the Court further said:

“And for those reasons, also, I believe that the testimony of Mr. Johnston that he saw the editorials would not warrant our introducing the editorials

¹⁷Although it is not necessary on this appeal to justify the reasoning of the trial judge, it is worth observing that the District Court's theory for the exclusion of this and other offers of evidence was admirably conceived toward getting an accurate and just determination of the issue. Since the critical issue turned on “public” opinion; and since it was obviously impossible to bring the public into the courtroom to testify; and since the problem of determining whether any witnesses or group of witnesses were fair samples of the public was insuperable; the trial court concluded that the nature of the public reaction should be judged from the conduct itself, just as in cases of libel the question whether a given utterance brings one into public scorn is determined not by calling witnesses to testify as to their reactions but from the nature of the statements published.

. . . and I do not believe that the testimony which was brought out on the part of the plaintiff in reporting to the plaintiff to the effect there was some consultation about the matter would warrant you in introducing what the other persons did . . .

“I have allowed you to introduce, to go into as much detail, and you may go into further detail. . . . but the mere fact that the names were referred to would not in themselves warrant the introduction of the nine pictures. Now, that is my thought at the present time. *I may change my mind in the morning*, but I am very positive about it . . . in other words, let me say this frankly. . . .”
[R. 825.]

“In view of that, and in view of my attitude toward the law, which may be assumed to be positive, they [defendant?] may have objections, but I *do not think they will change my mind*, because I have lived with this thing for three weeks and *my mind is still on it*.” [R. 826-827.]

Since there was no offer, there was no occasion for a ruling. But it is plain that even if the colloquy by the Court is incorrect, no final conclusion had been reached by the Court as to the admissibility of the evidence. But even if we should assume that the editorials were offered and rejected, no error was committed. The point was thus covered by the equivalent of indisputable evidence [R. 915, 916.] A party has no right to offer evidence on a matter of which judicial notice is taken. (*Lane v. Sargent*, 217 Fed. 237, C. C. A. 1; *Commissioner v. Marzyski*, 149 Mass. 682, 21 N. E. 228; *Taggart v. Keebler*, 198 Ind. 633, 154 N. E. 495; and *cf. Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292 at 300)

81 L. Ed. 1093, 57 S. Ct. 724; and see *Tilton v. Russek*, 171 Cal. 731, 734, 154 Pac. 860, 862, saying that judicial notice "presupposes the absence of evidence."

The last item of evidence offered was the testimony of Mr. Max Eastman. The exclusion, however, was proper for the following reasons: Eastman was not qualified as an expert on public opinion. The objection to Mr. Mayer's testimony was likewise applicable to his testimony. There was no sufficient foundation shown in the offer of proof to permit the question relating to public opinion. The only foundation offered was that "for many years and particularly the last two or three years" Eastman had been lecturing to divers audiences on social, economic and political problems. [R. 829.] It was within the discretion of the Court to hold that this was insufficient as a foundation, and this determination will not be disturbed on appeal unless clearly erroneous. (*White v. State of Maryland*, 106 F. 2d 392, 397; *Congress, etc. v. Edgar*, 99 U. S. 654, 25 L. Ed. 487; *Hutter v. Hommel*, 213 Cal. 677, 3 P. 2d 554; *New York Central Railway v. Newbold*, 151 N. Y. Supp. 732, 166 App. Div. 193.) It is clearly reasonable to conclude that a lecture platform is scarcely the equivalent of a Gallup Poll.

Again, there was no offer to show what the state of public opinion was concerning the Communist Party. [R. 829.] The offer was to show that the witness had such an opinion. This, of course, was plainly irrelevant.

But on the further assumption that the offer did include an offer to show what the public thought of Communists and Communism, we insist the evidence was irrelevant and the exclusion was proper because the subject matter was covered by the Court's instructions. Judicial

notice renders evidence superfluous. Finally, the attitude of the public toward Communists was immaterial because the defendant did not suspend plaintiff upon this ground. This evidence was immaterial because the notice of suspension did not charge Cole with being a Communist; and the public reaction to Communism cannot justify the suspension. What was in issue was the effect of the conduct of Cole which was described in the notice. To receive evidence and thus to create an issue as to the public attitude toward Communism would be to impose contractual consequences on Cole on a matter not within the scope of the issues. This would be wrong as a matter of law; it would also tend to influence the jury with passions and prejudices not germane to the issue. It was the court's duty to exclude. [R. 616.]. (Cf. *Owd v. Heller*, 82 N. H. 387, 134 Atl. 344.)

The Court Properly Excluded Evidence of the Aims and Loyalties of the Communist Party.

The issue concerning which appellant argues this evidence was relevant was whether Cole violated the moral clause of his contract by his conduct at the hearings. Appellant's argument is further based on the assumption that the public had the right to infer, and did in fact, infer from Cole's failure to answer certain questions, that he was a member of the Communist Party, and therefore the scorn and contempt held by the public for the Communist Party could be imputed to Cole. But, even conceding this much of appellant's premises solely for the purpose of argument, it does not follow that evidence tending to show the aims and loyalties of Communists was admissible.

It must be recalled that the notice of suspension did not purport to be based on Cole's *unlawful* conduct; and the employment contract did not give Loew's the right to terminate or suspend solely for the commission of a crime. Evidence, therefore, of the claimed criminal character of any organization to which Cole inferentially belonged would, therefore, not be material.

It should also be recalled that the Court did in fact instruct the jury as to the public attitude toward Communists as declared by the courts and this instruction accomplished all that appellant was entitled to accomplish, and more, because it not only put that before the jury but it gave that information to the jury in a form which rendered it indisputable.

Furthermore, the conclusion of the jury on evidence of special facts, or the conclusion of the jury based on information specially elicited for it, or based on anything not a matter of common knowledge, or in fact on anything justifying the reception of evidence would not determine any relevant issue. Such a conclusion would elicit, not a public reaction, but a reaction peculiar to the confines of the courtroom in which that evidence was brought forth.

It cannot be presumed that the public reaction was based on special information; and there was no reason to show that the evidence sought to be elicited from Mr. Eastman was public knowledge.

It needs only to be added that this evidence was not only irrelevant but was of a character to confuse and inflame the jury. Even if it were relevant (and we insist that it was not) it would have been within the discretion of the trial court to have weighed the degree of relevancy

as against its inherent tendency to make it impossible for the jury to consider the evidence calmly and dispassionately.

The Inquiry as to Cole's Motives for His Conduct Was Properly Excluded.

Under its Specification of Error No. 5 appellant argues it should have been permitted to ask Cole whether he was a Communist, and it seeks to support its contention on the ground that the question was within the scope of the direct examination.

The question was properly excluded. Whether Cole was a member of the Communist Party was irrelevant in the issue for the reasons already argued. Furthermore, collateral and irrelevant issues may not be inquired into on cross-examination. (*U. S. v. Manton*, 107 F. 2d 834 (C. C. A. 2, 1939); *Sims v. Green*, 160 F. 2d 512; *Sutherland v. U. S.*, 92 F. 2d 305.) "It is a very plain corollary to that rule that a question not otherwise material or proper does not become so by force or any purpose of the examining party to make issue of it to discredit the witness by contradicting his answers to it." (*Despiau v. U. S. Casualty Co.*, 89 F. 2d 43, 45 (C. C. A. 1, 1937).)

Furthermore, the scope of cross-examination on collateral matters is "peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th ed.) sec. 1308." (*U. S. v. Manton, supra*, 845.)

The Court Properly Excluded Questions Relating to Cole's Awareness of the Public Attitude Towards Communism.

Under appellant's Specification of Error No. 6 it argues it should have been permitted to elicit evidence showing Cole's awareness of the public attitude toward Communists and Communism.¹⁸

Such evidence was irrelevant and was properly excluded. Cole took the risk of the contractual consequences of his behavior. Had he been fully unaware of the possibility of bringing himself into scorn his ignorance would not have helped him, if indeed his conduct had brought him into scorn; nor, had he been fully apprised of the risks he exposed himself to, would his foreknowledge have helped. The contract gave Loew's certain rights by reason of the effect of Cole's conduct, not by reason of his precaution, prudence, foresight, or lack of any such qualities.

It is true the jury was instructed as to wilfulness, but the jury was merely told it was an intentional act. [R. 904.] Nothing was said about foreknowledge or awareness of possible consequences. Indeed the situation is like that in *Polkinghorn v. Riverside Portland Cement Company*, 24 Cal. App. 615, 142 Pac. 140, in which the Court excluded a question calling for knowledge of the existence of danger, but afterwards instructed the jury that the defendant was in fact charged with knowledge; the Court held that the error if any was cured by the instruction. (See also *Relfe v. Wilson*, 102 U. S. append. cl. xxxix, 26 L. Ed. 212.)

¹⁸Appellant's statement of this Specification is too broad; it includes an argument on the exclusion of questions concerning Cole's awareness of the consequences of his failure to answer questions. No such question was asked of Cole or included in the Specification of Error. However the reply here made would suffice to justify the exclusion of such question had it been asked.

Furthermore, since the subject of the question was collateral to the issues, it was not proper cross-examination. (See authorities *ante* under the hearing dealing with the exclusion of the public attitude towards Communism.)

Finally the error, if any, was cured by the verdicts. The jury found that Cole had not violated his contract; therefore the attention he gave to the possible consequences of his conduct was rendered academic.

**Loew's Continued Payment of Salary Was Relevant to the
Issue of Waiver,**

and

**The Continued Showing of Motion Pictures Was Relevant to
the Effect of Cole's Conduct.**

Under its Specification of Error No. 7, appellant argues that it was error to receive evidence of the continued payment of Cole's salary and evidence that Loew's continued to distribute various motion pictures written by Cole.

The two kinds of evidence should be considered separately. As to the continued payment of Cole's salary, this was included in the stipulation embodied in the pre-trial order. That stipulation recites that Loew's well and truly performed each and every obligation of the employment agreements until December 2, 1947. [R. 78-79.] Obviously payment of weekly salaries was one of its obligations under the employment agreements. [Contract Article 17, R. 23.] This evidence therefore went into the record without objection; and appellant cannot complain now.

Furthermore, the continued payment of salaries was plainly relevant to the issue of waiver.

That the issue of waiver was properly in the case has already been argued. (See discussion and authorities under heading *The Pre-Trial Order Did Not Preclude the Court From Charging the Jury Concerning Facts Stipulated by the Parties.*)

Appellant's argument that the continued distribution of the motion pictures was not inconsistent with suspension and that the evidence should therefore be excluded misses the effect of this evidence. This evidence shows that Cole's conduct did not have the effect which Loew's professed it had. That Loew's should continue to exhibit motion pictures written by Cole and carrying his name as author was of course wholly inconsistent with its professed statement that Cole's conduct had shocked the public and tended to injure Loew's. The very point of the morals clause which appellant relied on (and the only point on which it could rely) was that Cole's conduct had marked him for the public as an individual who was to be scorned, and that by reason of that scorn Cole's value to his employer diminished. But notwithstanding Cole's conduct Loew's continued to run motion pictures written by Cole. We insist this evidence was not only relevant but the strongest evidence showing that Loew's position was unfounded.

Furthermore, the admission of evidence even if deemed irrelevant, is of no consequence unless it be shown to be prejudicial. The reception is largely in the discretion of the trial court, and that discretion will not be overturned except on a plain showing of abuse. (*NLRB v. Donnelly Garment Co.*, 330 U. S. 219, 67 S. Ct. 756, 91 L. Ed. 854, 867; *Standard Acc. Ins. Co. v. Heatfield*, C. C. A. 9, 141 F. 2d 648; *Fort Street Union, etc., v. Hillen*, 119 F. 2d 307 (C. C. A. 6).)

IV.

The Affidavit to Transfer the Cause Did Not Disclose Any Personal Bias or Prejudice and Was Insufficient.

After the plaintiff's motion for judgment on the pleadings was filed, and after it had been argued and submitted, and while the parties were waiting for a decision on that motion, but before a decision was rendered, the defendant filed an affidavit for the transfer of the cause to another judge. [R. 48, 51.]

The affidavit alleged on information and belief that the District Judge has a personal bias and prejudice against the defendant and in favor of the plaintiff. This conclusion was supported by the following: It was averred that the District Judge had said, at a time when there was no cause pending in the United States Court that there was no legal justification for the suspension of any of the persons who had been indicted, that if any of the cases arising out of the suspension came before him he would have to render judgment for the plaintiffs, and that if he were the attorney for the plaintiffs he could recover judgments in their favor for millions of dollars [R. 44.] It should be noted no person, either employer or employee, plaintiff or defendant, was named.

The District Court held that the affidavit was insufficient because it failed to state any facts pointing to *personal* bias or prejudice. [R. 53 *et seq.*]

The ruling was obviously correct.

The affidavit must be strictly construed. (*Scott Beams*, 122 F. 2d 777, cert. den., 315 U. S. 809, 62 S. Ct. 799, 86 L. Ed. 1209; *Keown v. Hughes*, 265 Fed. 57; *Sanders v. Allen*, 58 Fed. Supp. 417.)

The statement that the District Judge was personally biased or prejudiced does not satisfy the statute; facts must be stated to show the existence of the personal bias or prejudice. (*Hurd v. Letts*, 152 F. 2d 121; *Millslagle v. Olson*, 128 F. 2d 1015, reh. den., 130 F. 2d 212; *In re Lisman*, 89 F. 2d 1898; *Wilkes v. United States*, 80 F. 2d 285; *Benedict v. Sieberling*, 17 F. 2d 831.)

The exact meaning of the word "personal" in the statute (28 U. S. C. A., Sec. 25) is that bias or prejudice *in favor of or against one of the parties* which renders a fair consideration of the issues unlikely. [*Ex parte American Steel Barrel Co.*, 230 U. S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379; *Equitable Trust Co. of New York*, 232 Fed. 836; *Wilkes v. United States*, 80 F. 2d 285; *Price v. Johnson*, 125 F. 2d 806; *Henry v. Speer*, 201 Fed. 869; and see authorities collected in opinion of District Court, R. 55.]

Nothing in the affidavit shows personal bias for or against either of the parties. The most that can be said is that the District Judge entertained an opinion on the legal justification for the suspension. But this plainly is not the same as *animus* against the defendant or affection for or bias in favor of the plaintiff. The authorities above referred to distinguish between fixed opinions as to the law and personal bias, and likewise distinguish between, on the one hand, bias or prejudice which is not personal but which is derived from the background and experience of the Judge, and on the other hand bias which is personal within the meaning of the statute, that is to say, bias which is in favor of or against one of the parties.

The argument of appellant is that an opinion not formed on the evidence constitutes personal bias or prejudice.

This argument is unsupported by the authorities; it would offer a new method of disqualification wholly unnecessary for the proper administration of justice.

The *Craven* case (*Craven v. U. S.*, 22 F. 2d 605) relied on by appellant merely reaffirms the necessity for personal bias. "There is in the affidavit no intimation that prior to the first trial the presiding judge had any bias or prejudice, personal or other, against the defendant. So far as appears, he had never heard of him or his alleged offense" (*ibid.* 607). The *Moskun* case (*Moskun v. U. S.*, 143 F. 2d 129), did not involve any disqualification procedure under the statute. The same is true of the *Ferrari* case (*Ferrari v. United States*, 169 F. 2d 353). In *Schmidt v. United States*, 115 F. 2d 394, the affidavit disclosed that the Judge had expressed an opinion personally prejudicial to the defendant and "personally hostile and antagonistic to him . . . and had assumed the role of a prosecutor" (*ibid.* 398). In *U. S. v. Sixteen Thousand Acres of Land*, 49 Fed. Supp. 645, the Court held that impersonal prejudice resulting from a Judge's background or experience or even prejudice against a particular type of litigation is not prejudice within the meaning of the statute, citing *Price v. Johnson, supra*, decision of the Ninth Court of Appeals. In *In re Beecher*, 50 Fed. Supp. 530, no affidavit was presented, the District Court ruled adversely to the affiant's contentions and held that merely making "unfair and uncomplimentary remarks" did not constitute personal bias or prejudice. *Ryan v. United States*, 99 F. 2d 864, held that even when the District Judge expresses the opinion that "sinister forces are at work," and "lurking in the background" in the case, this did not constitute a showing of personal prejudice.

It is true that some of the decisions say that an opinion formed on the basis of evidence in the record is not a "personal" opinion within the meaning of the statute. But none of the cases hold that an opinion formed from sources other than evidence, as for example an opinion derived from the background and experience of the Judge, is for that reason the equivalent of personal bias or prejudice *in favor or against one of the parties*. An opinion may be "personal" to the Judge; that is to say, it may be derived from non-judicial sources and in the course of the judge's personal experience. But this is not the same as an opinion evidencing the judge's personal bias for or against the parties.

It is submitted that the affidavit for transfer of the cause was insufficient.

Conclusion.

Because of the facilities available to appellant, as a producer of motion pictures, the jury was put in a position of the closest intimacy with the facts most vitally in issue. The heart of this controversy centered about the plaintiff's conduct on the witness stand. Not only was the transcript of the plaintiff's testimony put in evidence, but a phonographic recording of the proceedings was played twice in the hearing of the jury, so that all of the sounds of the exact scene were brought alive in the courtroom. More than this, a motion picture film reproducing exactly, in detail, as well as in duration, the plaintiff's entire conduct on the witness stand was exhibited to the jury. It is not possible to imagine any trial which has brought to the jury the living facts concerning which the issues arose as vividly or as authentically as was done in the Court below.

On the basis of that evidence, as well as a full and impartial hearing, twelve jurors acceptable to the appellant unanimously found that the appellee had not violated his contract. The Court, by independent findings, reached the same conclusion. It is respectfully submitted that only the strongest showing of prejudicial error should move this Court from anything other than an affirmance.

Historically the function of the Courts has been to channel the issues and to require their presentation to a jury in such a way as to make it possible to render a calm, dispassionate verdict, cut free from the entangling agitations of prevailing prejudices. The decisions have assumed that twelve citizens, representative of the country, would be more likely to be biased in their consideration of the issues than would the Court. And for that reason Courts have traditionally sought to impress jurors with their duty to render a verdict on the facts and in accordance with the law, without regard to political excitations.

In the present case, had any such existing tendencies operated, they would have operated in favor of appellant. Notwithstanding that, the jury as well as the Court reached conclusions entirely favorable to the plaintiff.

Yet many of the arguments in Appellant's Brief appear to have been made not for their intrinsic merit but in the hope that the arguments would steep the appellee's case in the agitation concerning Communists and Communism. It is as though appellants sought to accomplish with this reviewing Court, in stirring the kettle of hysteria, what they had failed to achieve with the jury.

The position taken by the employer was wholly unprecedented in the history of the motion picture industry; it was based on a tenuous, insubstantial, and concededly shaky construction of a motion picture employment con

tract which surely must have been drawn with wholly different purposes in view. Not only that, but the employer's position represented a drastic *volte face*, without warning to anyone until it was too late.

It should be borne in mind that what the Court was called on to enforce was a property right, that is, a right arising out of a contract. Courts and scholars have long recognized that while political controversies may ebb and flow, in order to prevent serious injury to society, rights arising from contract must be protected. Any other course would invite name-calling and trial by epithet.

The appeal, we submit, is without merit. The proceedings were free from error, and the judgment accomplished substantial justice.

Respectfully submitted,

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2000

1950

No. 12222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S CLOSING BRIEF.

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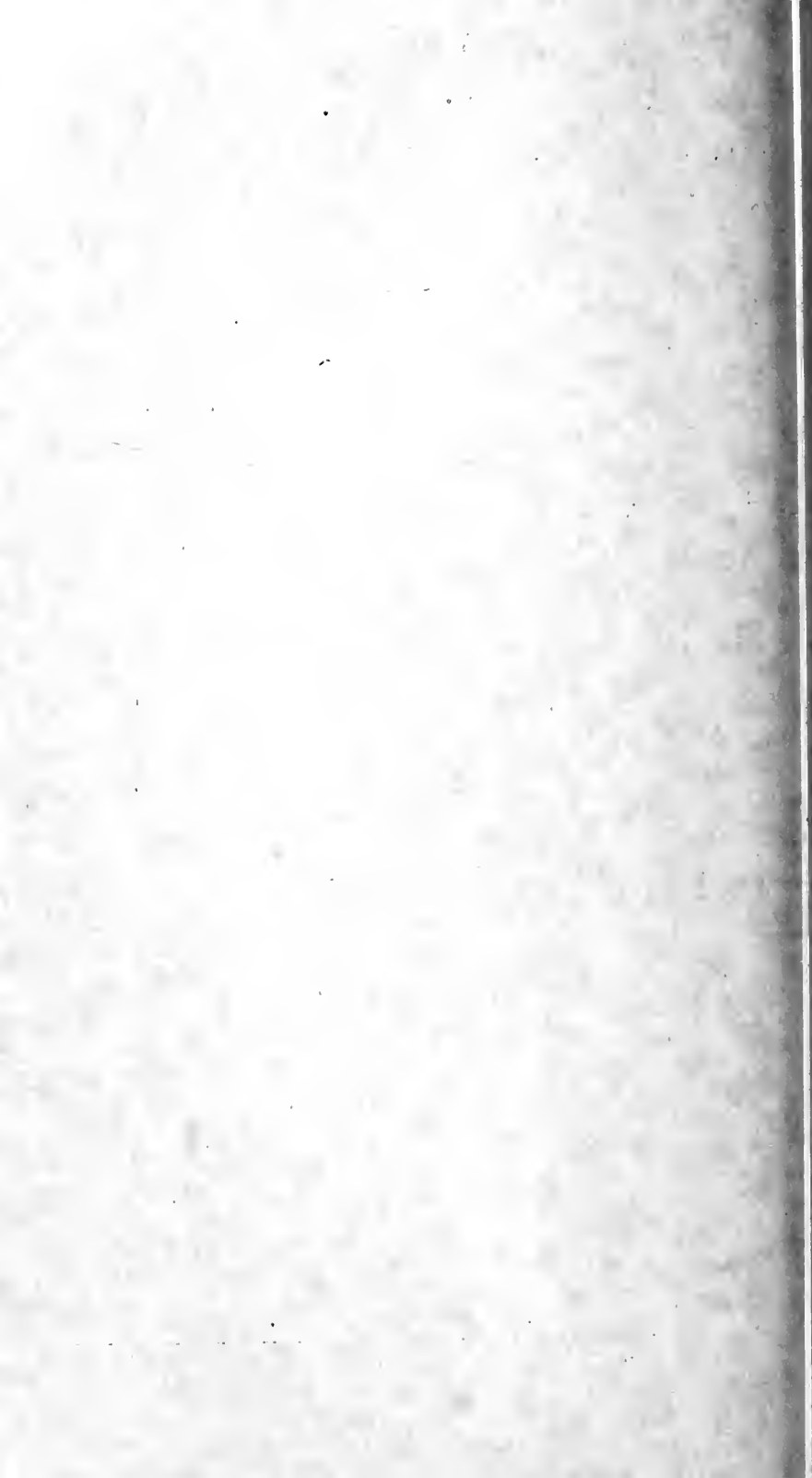
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No. 12222
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S CLOSING BRIEF.

Preliminary Statement.

In this closing brief it will be assumed that the court has in mind the theory of the case and the attack upon the judgment developed by appellant in the Opening Brief.¹ In replying to Plaintiff's Brief a mere reference to the Opening Brief will be made when it is thought that plaintiff's argument on any point has been fully covered therein.

It is believed that plaintiff does not attempt to answer many of defendant's arguments and that in a number of instances where plaintiff purports to answer an argument, the answer is in effect merely a statement that what defendant says is not so. The limitation of length imposed by the rules is such that defendant cannot catalogue these situations and must assume that they will be evident to the court.

There are instances in which plaintiff's statements of defendant's position does not accord with that position as

¹"O. B." will refer to Appellant's Opening Brief, and "P. B." to Appellee's Brief. The parties will be referred to by their designations in the trial court.

expressed in the Opening Brief and there are some instances where it is believed that statements in Plaintiff's Brief are not supported by the record. This brief will contain some comment in this regard by way of illustration, but here again, because of the limitation of space, defendant will rely largely upon the fact that in its Opening Brief defendant has defined its position, and has presented a statement of the case to which plaintiff takes no exception.

Comment Upon Plaintiff's "Statement of the Case" and "The Facts."

In this comment defendant will follow plaintiff's numbered paragraphs.

1. See Opening Brief as a whole.
2. The circumstances leading up to the Notice of Suspension (insofar as defendant was permitted to show them) are set forth in defendant's "Statement of Fact" (O. B. pp. 10-34), without, we believe, characterization, coloring or argument.

The injury which defendant's reputation suffered through plaintiff's actions did not have to be measured in money and injury to its reputation was implicit in the public reaction which defendant should have been permitted to prove or concerning which the court should have instructed as a matter of judicial knowledge. In fact injury from an employee's breach of his employment contract is not a necessary condition to exercise of the employer's rights. (*Bank of America v. Republic Productions*, 44 Cal. App. 2d 651, 654, 112 P. 2d 972, 974; *May v. New York M. Pic. Corp.*, 45 Cal. App. 396, 404, 188 Pac. 785, 788; *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485, 487; *Farmer v. First Tr. Co.* (C. C. A. 7), 236 Fed. 671, 673; *Von Heyne v. Tompkins*, 8

Minn. 77, 93 N. W. 901, 903-4; *Brown v. Dupuy* (C. C. A. 7), 4 F. 2d 367, 369.)

The defendant has never argued plaintiff's right as an individual to refuse, and take the consequences of refusal, to answer the questions asked by the Congressional Committee, but contends that since his refusal brought the foreseeable public reaction claimed by defendant, it constituted a breach of contract.

3. See our preceding "2."

4. See Opening Brief as a whole.

The statement (P. B. 4 & 5) that defendant was informed that at a private hearing by the Committee plaintiff was charged with being a Communist, is not supported by the citation.

In Opening Brief pages 31-32, 88-90, there is a complete refutation of plaintiff's statement (P. B. p. 15) that prior to testifying plaintiff had no intimation that his employment might be jeopardized by his conduct in connection with the Committee hearings.

Beginning at page 15 and through page 18 of his brief plaintiff discusses the evidence relative to matters transpiring after these hearings. These matters are dealt with fully in the Opening Brief at pages 21-23, 27-31, 81-83.

"The Pleadings."

In his reference to the pleadings, plaintiff fails to note that one of the issues arose from plaintiff's allegation that defendant did not have the right to suspend plaintiff's employment *or compensation* for any reason or ground *whatever* [R. 4-5]—an issue which warranted due consideration of defendant's contention that it did not have to confine justification of its actions to the reasons assigned in the Notice of Suspension.

ARGUMENT.

I.

The Doctrine of Practical Construction Is Not Open on This Appeal Because It Was Not Urged Below. And Even If Open Is Not Applicable to the Facts in Evidence.

Plaintiff contends that even if his conduct has the effect or tendency of bringing him into public scorn and contempt, the parties have placed a practical construction on the employment contract excluding his specific conduct before the Committee from the operation of paragraph 5, the so-called "public relations" or "morals" clause. (P. B. pp. 22-27.) The contention is unsound and unavailable, as may be readily shown.

First: The contention is not open to plaintiff on the present record, because it raises an issue not presented, considered or determined below. Neither by motion for judgment or directed verdict, nor request for a special verdict did plaintiff bring to the trial court's attention his present claim that the contract had been so interpreted by the parties. To the contrary, it is quite evident from the record as a whole that the cause was tried below on the theory that if plaintiff's conduct in fact had the effect or tendency claimed for it by defendant a violation of the contract was made out. In that condition of the record the new theory is not open on appeal, even to bring about an affirmance. (*Foster & Kleiser Co. v. Special Site Sign Co.* (C. C. A. 9), 85 F. 2d 742, 751; *Sacramento Subl etc. Co. v. Melin* (C. C. A. 9), 36 F. 2d 907, 909; *World Fire etc. Ins. Co. v. Carolina Mills Dist. Co.* (C. C. A. 8), 169 F. 2d 826, 829; *Meloon v. Davis* (C. C. A. 1), 292 Fed. 82, 87; *Peck v. Heurich*, 167 U. S. 624, 629, 42 L. Ed. 302, 17 S. Ct. 927; *Ford Motor Co. v. Farrington* (C. C. A. 9), 245 Fed. 850, 852-853.)

Second: Assuming for the moment that the rule of practical construction would have been available if timely urged, it is clear that its application would have injected another question of fact into the case; for evidence of conduct claimed to constitute an interpretation by the parties is "not conclusive . . . and it may be disregarded in favor of more satisfactory evidence to the contrary . . ." (*Riverside Heights etc. Co. v. Riverside Trust Co.*, 148 Cal. 457, 467, 83 Pac. 1003, 1007; *Caletti v. Slate*, 45 Cal. App. 2d 302, 305, 114 P. 2d 9, 10.)

The rule which prevents consideration of new theories on appeal is applicable *a fortiori* when, as here, an issue of fact which should be passed on by the jury is involved in the new theory. (*Securities & Exchange Com. v. Chenery Corp.*, 318 U. S. 80, 88, 87 L. Ed. 626, 633, 63 S. Ct. 554; *Meloon v. Davis*, *supra*, 292 Fed. at 87.)²

Third: In California, evidence of so-called practical construction by the parties may be resorted to *only* when the contract is ambiguous. (*Jameson v. Chanselor etc. Oil Co.*, 176 Cal. 1, 8, 167 Pac. 369, 371-372; *Pierce v. Merrill*, 128 Cal. 464, 472, 61 Pac. 64, 66; *Truett v. Adams*, 66 Cal. 218, 222-223, 5 Pac. 96, 100; *Dabney v. Dabney*, 9 Cal. App. 2d 665, 670, 51 P. 2d 108, 110; *Hughes v. Pacific Wharf etc. Co.*, 188 Cal. 210, 217, 226,

²The cases cited by plaintiff (P. B., p. 27) are not in point. In *Carlisle v. Sandeagle*, 295 U. S. 255, 66 L. Ed. 927, 42 S. Ct. 510, no new issue of fact was involved in the theory urged on appeal. In *Hornblower v. City*, 241 Fed. 450, the court merely declined to pass on the sufficiency of all the defenses urged below, because it found one of them—which had been raised in the trial court—sufficient to support the judgment. *Sun v. Vinton*, 248 Fed. 623, held only that a point which if good would have required an affirmance on a prior appeal, was waived by failing to urge it at that time, so that after a reversal, it was not open on the second appeal. If this decision has any relevancy here it is in support of our contention.

205 Pac. 105, 108, 111-112; *Hine v. State Life Ins. Co.*, 140 Cal. App. 657, 661, 35 P. 2d 1042, 1044; *Skousen v. Herz*, 135 Cal. App. 116, 121, 26 P. 2d 498, 500; *Purdy v. Buffums, Inc.*, 95 Cal. App. 299, 303, 272 Pac. 770, 771; *Briggs v. Marcus-Lesoiné, Inc.*, 3 Cal. App. 2d 207, 212, 39 P. 2d 442, 444; *Coneland Water Co. v. Nickalls*, 75 Cal. App. 12, 219, 242 Pac. 518, 521; *Moreing v. Weber*, 3 Cal. App. 14, 21, 84 Pac. 220, 222-223.)

It has never been claimed in this case—in fact it is not even now argued—that the public relations clause of the contract is ambiguous. Nor could it well be so argued for its language is plain to the effect that the plaintiff “will not do *any* act or thing that will tend to . . . bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community . . . or prejudice the producer or the motion picture industry in general.” [R. 12, italics ours.] To be sure, whether any given act by plaintiff has the prohibited tendency or effect, may present an arguable question of fact for a jury; but that does not render the *contract* uncertain. The latter clearly applies to *all* conduct which has the necessary tendency or effect. Assuming, as the form of plaintiff’s contention requires, that his conduct did have this tendency or effect, the “practical construction” sought by him would eliminate it as a ground of default, thus flying into the teeth of the contractual requirement that *all* such conduct is banned.

Fourth: It is equally well settled in California that the acts of the parties relied on as a practical construction must appear with reasonable certainty to have been the acts of both parties and to have been done with knowledge and in view of the purpose later sought to be attributed to them (*Skousen v. Herz, supra*, 135 Cal. App. at 121, 26 P. 2d at 500; *Pastene & Co. v. Greco Canning Co.*

(D. C. Cal.), 268 Fed. 168, 171); or, as some of the other decisions put it, the "acts must be direct, positive and deliberate and must show that the acts were done in an attempted compliance with the terms of the contract or agreement . . ." (*Barnhart Aircraft, Inc., v. Preston*, 212 Cal. 19, 24, 297 Pac. 20, 22; *Canavan v. College of Osteopathic P. & S.*, 73 Cal. App. 2d 511, 518, 166 P. 2d 878, 882.)

No such showing was made in the case at bar. The act relied on as a practical construction—*i. e.*, telling plaintiff that Mr. Mannix had told the Committee's investigators, in response to their inquiry whether Mannix knew that plaintiff and another writer were Communists, that he (Mannix) was not concerned with whether they were or not (O. B. p. 27)—certainly was not anything done in attempted compliance with the contract. Nor was it done with any knowledge or contemplation of the purpose now attempted to be ascribed to it, that is, as an interpretation of the contract. The contract was not even mentioned in the conversation.

Furthermore, the conversation took place months before plaintiff staged his defiant scene in Washington, D.C. There was not then, nor was there ever, any notice or intimation to the defendant that the plaintiff intended to defy the Congress or refuse to answer its pertinent questions directed to a burning and vital issue, then and now uppermost in the minds of Americans. Nor was there anything in the conversation that tended in the slightest to indicate that such or any conduct which violated the public relations clause would be condoned or overlooked by the defendant.

The evidence relating to the statements of Messrs. Johnston and McNutt (P. B. p. 24) is subject to these same comments. In addition, it should be noted that these gentle-

men were *not plaintiff's employer*, a fact which plaintiff himself emphasizes when it suits his purpose. (See, P. B. pp. 52, 55.) Their acts, therefore, were not the acts of one of the parties to the contract and so could not possibly be of any effect as a construction of it. (*Skousen v. Herz*, *supra*, 135 Cal. App. at 121, 26 P. 2d at 500; *Pastene & Co. v. Greco Canning Co.*, *supra*, 268 Fed. at 171.)

Fifth: Plaintiff seems to intimate that the public relations clause applies only to acts involving moral turpitude. (P. B. pp. 24-25.) But nothing in the contract justifies such a limitation of its language; and nothing specific or tangible in that regard is pointed out by plaintiff. The question, under this clause, is not whether the employee's conduct is immoral or criminal, but whether it tends to bring him into public scorn or contempt, prejudice his employer or shock or offend the community. That tendency could inhere in conduct technically lawful in itself; and that it actually did inhere in plaintiff's conduct was a fact the defendant offered, but was not permitted, to prove. (O. B. pp. 106-109, 113-118.)

Sixth: The authorities cited in this connection by plaintiff are as irrelevant as his argument. *Carpenter v. Norcross*, 204 Fed. 537, and *Herbert v. Wood*, 113 Misc. 671, 185 N. Y. S. 325 (P. B. p. 24), held that where an employee was discharged for intoxication and there was evidence that he was drinking with customers at the instance and with the consent of his employer, it could not be said as a *matter of law* that his drunkenness was justification for his discharge; it was a question of fact for the jury.

Child v. Boyd, 175 Mass. 493, 56 N. E. 608 (P. B. p. 24), held only that immorality as such, *i. e.*, resort to house of prostitution, was not ground for discharge unless

it rendered the employee unfit for his work. It did not appear that the employee had agreed not to so conduct himself. In the case at bar the employee expressly agreed not to do any act or thing which would tend to bring him into public scorn, contempt and the like. Of course, an employee may by agreement make his continued employment depend on matters which in the absence of agreement would not be grounds for ending it.

II.

The Contract Confers the Right of Suspension. Even If It Does Not, Plaintiff Cannot Recover, and Defendant Is Entitled to Refuse Its Performance, So Long as Plaintiff Is in Default.

First: The argument which is offered in support of the contention that there is no right to suspend for a violation of the public relations clause (P. B. pp. 27-30) would be more appropriate if the question were the non-justiciable one of whether it would be wise for plaintiff to agree to a contract in which such a right was granted. The fact is, however, that he did agree and since there is no claim of fraud, mistake or any other infirmity in his execution of the contract, it is obviously of no legal significance that the bargain which he made was an unwise or even a hard one.

Plaintiff does not and cannot deny that a violation of the public relations clause would entitle the employer to terminate the contract. He cannot deny this, because paragraph 11 of the contract expressly provides [R. 17-18, italics and parenthetical lettering ours]:

“ . . . In the event of the failure, refusal or neglect of the employee to perform his required services *or observe any of his obligations hereunder* to the full limit of his ability or as instructed, the producer,

at its option, shall have the right [a] to cancel and terminate this employment, [b] may refuse to pay the employee any compensation for and during the period of such failure, refusal or neglect on the part of the employee, and shall likewise have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues”

It will be noted at once that the right to suspend, *i. e.*, the right to refuse payment of compensation and to extend the term of the contract, is given for exactly the same defaults as would justify termination of the contract. The failure, refusal or neglect to observe *any* of the employee's obligations — and compliance with the public relations clause was one of his obligations—gives the employer, at his option, the right of termination *or* suspension. No differentiation between these two remedies, in respect of the causes which bring them into being, is made in the contract. It follows, therefore, that since a violation of the public relations clause would admittedly justify termination of the contract, it must also justify its suspension.

Plaintiff's counsel must realize the significance of the juxtaposition of these alternative remedies; for whenever they had occasion to quote or refer to paragraph 11 in their brief, they very carefully omitted the language which indicates that the right of suspension is coextensive with, and is brought into being by exactly the same defaults as, the right of termination. (See, *e. g.*, P. B. pp. 19, 27-28.) Their lack of candor in this regard speaks out eloquently against the argument they make.

Second: In point of fact, it is of no consequence whether the contract does or does not give a right of suspension for failure to observe the public relations clause.

Since such a failure would be a breach of contract, the defendant would have the right, as a matter of general contract law, to refuse to perform further. (O. B. pp. 68-69.) The so-called "suspension" is no more than a refusal on defendant's part to perform.

Third: It is also immaterial that the suspension was accompanied by conditions which were improper or impossible of performance. (P. B. pp. 34-36.) Assuming, without conceding, that to be so, the situation would be only that of a defendant who had required as a condition of continued employment compliance with directions not permissible under the agreement; in other words, had itself broken a contract which had been first breached by the plaintiff. The defendant's subsequent breach would not reinstate the plaintiff's right of recovery which he lost by his own default. (Cases cited, O. B. pp. 68-69.)

In short, if the conditions of the notice are eliminated entirely by a declaration of invalidity, the fact still remains that plaintiff cannot enforce the contract so long as he has not himself performed his obligations under it. It is still necessary, therefore, to decide whether the issues of performance were fairly submitted to the jury.

Fourth: Plaintiff's fear that the right of suspension gives the employer the power to keep him off the labor market forever (P. B. p. 30) is entirely illusory. (See, also, Point V, *Second, infra.*) In California, no personal service contract can "be enforced against the employee beyond seven years from the commencement of services under it . . ." (*Cal. Labor Code*, Sec. 2855.) And this is true even when the seven-year limit is exceeded because of extensions of the term by consent or by reason of the employee's default. (*De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 234-237, 153 P. 2d 983, 987-989.)

III.

The California Political Activity Statute Is Not Applicable Because No Political Activity of Plaintiff Was Interfered With.

The argument based on the California political activity statute (*Cal. Labor Code*, Secs. 1101-1103) adds nothing to the case.

First: Assuming that the effect of the statute is to prevent an employer from discharging or suspending an employee for political activities or affiliation, no violation of the statute has been shown in the case at bar. The test of whether any given activities are within the proscription of the statute is "whether those activities are related or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government. . . ." (*Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 485, 171 P. 2d 21, 22.)

The activities which gave rise to the present dispute were certainly not of the kind included within the ambit of the statute. How can it reasonably be said that responding to a subpoena to testify before a Congressional Committee is a "political activity," particularly when the response consists of a criminal and contumacious refusal to answer pertinent questions? As said in the *Lockheed* case, political activities are those related to the *orderly* conduct of government. They cannot, under any proper definition, be said to include activities which are neither orderly nor lawful nor connected with the conduct of government.

The right to be a witness or as a witness to insist upon constitutional rights or immunities is not political. Such a right falls within the much broader definition of "civil rights" whereas "political activities" or "political rights"

are only those concerned with "the power to participate directly or indirectly in the establishment or management of government. The elective franchise and the right to hold public offices constitute the principal political rights of citizens of the several States." (*People v. Washington*, 36 Cal. 658, 662; *State v. Collins*, 69 Wash. 268, 124 Pac. 903, 904-905; *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681, 684; *Litzelman v. Town of Fox*, 285 Ill. App. 7, 1 N. E. 2d 915, 917; *Friendly v. Olcott*, 61 Ore. 580, 123 Pac. 53, 56; *Payne v. Emmerson*, 290 Ill. 490, 125 N. E. 329, 321; *Haupt v. Schmidt*, 70 Ind. App. 260, 122 N. E. 343, 344.)³

Second: So far as political affiliation is concerned, the Supreme Court of California has held expressly that Sections 1101-1103 of the *Labor Code* do not protect "any individual or group advocating the overthrow of the government by force and violence . . ." (*Lockheed Aircraft Corp. v. Superior Court*, *supra*, 28 Cal. 2d at 485, 171 P. 2d at 22.) If, therefore, the Communist Party is such a group, the non-Communist affidavit required of the plaintiff was not an illegal condition.

It will be recalled that the defendant sought, but on plaintiff's objection was not permitted, to prove that the Communist Party was just such an organization. (O. B. pp. 116-117.) Having prevented the defendant from proving facts which would have made the statute inapplicable, he obviously cannot now be permitted to invoke it for his benefit. Certainly, if he does invoke it he but demonstrates the serious and prejudicial error in the trial court's exclusion of that evidence.

³If plaintiff's appearance before the Committee was political activity, how can he justify his contention that defendant was entitled to direct him as to the manner of his conduct there (P. B. pp. 52-3) or reconcile that contention with the argument which he bases on the political activity statute? (Cf., note 33, O. B. p. 91.)

IV.

The Interference of Third Parties With Plaintiff's Contractual Relations Do Not Affect His Employer's Rights, Whatever May Be the Result as Against the Third Parties.

The fact that defendant's action in suspending plaintiff may have been induced by others is entirely immaterial, even if it be a fact, which it is not.⁴ All that would result from such interference by third parties with plaintiff's contractual status would be a cause of action in plaintiff against the third parties responsible. And that is as far as the cases cited by plaintiff go. (P. B. pp. 33-34.)

As between *the parties to the contract*, the question is not why the employer acted as he did, but whether he had the right so to act. If an employer has the right to discharge or suspend, the fact that he was induced to exercise it by another is material only in an action between the employee and that other. The employer's motive or reason for availing himself of his legal right is of no concern to the law. If he has the right he may resort to it in bad faith or out of ill will or for any other motive; if he has no such right, neither the highest of good faith nor the most exemplary of motives will save him. In either event his motive is immaterial. (*May v. New York M. Pic. Corp.*, 45 Cal. App. 396, 404, 187 Pac. 785, 788; *Development Co. v. King* (C. C. A. 2), 161 Fed. 91, 93; *Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894, 895-896; 39 C. J. 89, Sec. 90; 56 C. J. S. 435.

⁴The declaration of policy, which is the basis upon which plaintiff's argument is postulated, was entered into voluntarily by the defendant and its acts out of which this suit arose were dictated by its executives. (O. B. pp. 21-23.) There is no evidence to the contrary and none is cited by plaintiff.

Sec. 44; 35 Am. Jur. 471, Sec. 37.)⁵ The fact that he is prompted to act by the suggestion or even persuasion of others does not transform into a breach of contract that which, in the absence of the prompting, would not violate the agreement.

V.

The Conditions of the Notice of Suspension Were Not Improper or Void.

First: The contention that the contract is void because it restrains plaintiff from engaging in a lawful profession (P. B. pp. 34-35) is a strange one to emanate from a party who is seeking to *enforce the contract*. If the contract is void for this reason (and we are not to be understood as conceding in any way that it is), it is entirely void. There is nothing to show that the agreement would have been made by the defendant without the right to suspend for failure, refusal or neglect of the employee to observe his obligations. Nor is there anything to indicate how much of the total consideration agreed to be paid by defendant was apportioned to plaintiff's grant of the right of suspension. In the absence of such a showing, the void provision cannot be severed and the whole contract falls. (*Morey v. Paladini*, 187 Cal. 727, 738, 203 Pac. 760, 764; *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 118, 81 Pac. 416, 417; *More v. Bonnet*, 40 Cal. 251, 254-255.)

Actually, however, the contract is not void. It does not restrain plaintiff from carrying on a lawful trade or pro-

⁵See, also, the following cases, establishing the rule in California that the doing of an otherwise lawful act is not made wrongful because of the motive with which it is done. (*Automobile Ass'n v. Automobile O. Ass'n*, 216 Cal. 125, 142, 13 P. 2d 707, 714-15; *Union Labor Hosp. v. Vance Lbr. Co.*, 158 Cal. 551, 554, 112 Pac. 886, 887-88; *Fisher v. Feige*, 137 Cal. 39, 41-42, 69 Pac. 618.

fession. On the contrary, it affords him the opportunity to carry one on—and at the very handsome remuneration of \$1350 per week. No one has heretofore supposed that an employee who agrees for a limited term to work exclusively for one employer has thereby entered into an illegal contract in restraint of trade; and no case so holding is cited by plaintiff. The cases which are cited all involved contracts which wholly prevented the exercise of a trade or profession even though the party restrained faithfully performed his part of the agreement. That is an entirely different situation from an employer-employee relationship, in which the party allegedly restrained not only may, but is required, to engage in a trade or profession so long as he observes his own obligations upon which the continuance of the employment is conditioned.

Second: The fact that in the event of the employee's failure, refusal or neglect to perform his obligations the employer may refuse to pay the agreed compensation adds nothing to the contract which would not be a part of it by force of the general law of contracts. (O. B. pp. 68-69.) Such an agreement is, in effect, nothing more than a recognition of the common law doctrine of failure of consideration. (*Richter v. Union Land etc. Co.*, 129 Cal. 367, 372, 62 Pac. 39, 40; *Mulborn v. Montezuma Imp. Co.*, 69 Cal. App. 621, 628-629, 232 Pac. 162, 165; *Restatement*, Contracts, Sec. 274; 3 Williston on Contracts (Rev. Ed.), 2289, 2324, 2443, Secs. 813, 831, 869.)

Upon defendant's refusal to perform plaintiff had the right to treat the contract as at an end, even though the defendant's refusal was justified; a right which he had *a fortiori* if, as he contends, the refusal was not justified. [Cases cited, O. B. pp. 68-9; *Restatement*, Contracts, sec. 399(1).] Had he made that election he would have been free to work elsewhere. He did not so choose, but instead,

sought to keep the contract in force, insisting that plaintiff's refusal to perform was without justification. If he should ultimately prevail in this contention, he will receive the agreed consideration for his services. If he should be defeated, however, his inability to work elsewhere while going uncompensated by defendant, results, not from any contractual restraint, but from his own election not to avail himself of his legal right to be free of the agreement. He was not restrained by the contract, but by his own voluntary choice of remedies.

Third: Nor is the contract rendered unlawful by the provision that its term may be extended for a period equal to that during which the employee was in default; particularly when it is kept in mind that the aggregate period of service cannot be extended beyond seven years in any event. (Point II, *Fourth, supra.*) Entirely apart from any question of default, it would never be contended that parties could not validly contract for a term of exclusive employment of, say, two years, extendable at the employer's option to three, four, five, six or seven years.⁶ The right of extension to which plaintiff now objects is even more limited, for it is exercisable only in the event, and for the period of, plaintiff's default. He had the power to defeat the right entirely by observing his obligations.

Fourth: The propriety of the non-Communist affidavit and the inapplicability of the political activity statute (P. B. pp. 35-6) have already been shown. (Points II, *Third*; III, *supra.*)

⁶In fact, that is exactly the contract that plaintiff made [R. 24-25]; and plaintiff was not heard to complain of any invalidity when defendant exercised its first option so to extend.

VI.

The Defendant Did Not Waive Plaintiff's Default by Insisting That He Had Violated the Contract and That as a Result Defendant Need Not Perform.

Plaintiff's criticism of our contractual theory (P. B. p. 37) has already been answered in the main. (Points II and IV, *Second, supra.*) We add a word on the assertion that by seeking to suspend, *i. e.*, by refusing to perform, because of plaintiff's default the defendant in some way waived that default. The defendant has at all times insisted that plaintiff was in default; and that because of that default the defendant would not perform its part of the contract. How can that possibly be held to be a waiver?

The most that can be said on plaintiff's side is that the defendant invoked a broader remedy than was open to it. But the erroneous resort to a non-available remedy does not deprive the injured part of his right subsequently to have a proper remedy. (*Kulawits v. Pac. etc. Paper Co.*, 25 Cal. 2d 664, 672, 155 P. 2d 24, 28-9; *Agar v. Winslow*, 123 Cal. 587, 590-2, 56 Pac. 422, 423; *Atchafalpa Ry. Co. v. Superior Court*, 12 Cal. 2d 549, 555, 86 P. 2d 85, 88; *Herdan v. Hanson*, 182 Cal. 538, 541-2, 189 Pac. 440, 442; *McGibbon v. Schmidt*, 172 Cal. 70, 75, 155 Pac. 460, 463.) Especially is this so when, as here, the contract expressly provides, that "the several rights, remedies and options of the [defendant] . . . shall be construed as cumulative and no one of them exclusive of the other or of any right or remedy allowed by law . . ." [R. 19.]

VII.

**The Charge to the Jury Was Prejudicially Erroneous.
Plaintiff Has Not Shown the Absence of Error
or Prejudice.**

For the most part, plaintiff's argument in respect of the errors in the charge to the jury has been anticipated and squarely met in our opening brief. For that reason and because of the limits imposed upon the length of this brief our reply will be somewhat summary.

A. The Instructions Relative to the Law of Libel and the Status of the Communist Party in California Constituted Prejudicial Error.

First: Plaintiff asserts baldly that the charge on libel was pertinent; but no issue of fact or law which would make it so is pointed out. (P. B. pp. 39-42.) Nor is there even an attempt to reply to the specific indications of prejudice to which we referred. (O. B. pp. 70-74.) Furthermore, there is no adequate answer to the decisions cited by us holding that abstract and irrelevant instructions are necessarily confusing and improper; and that erroneous instructions which affect substantial rights of the appellant, are prejudicial unless it *affirmatively* appears that they were harmless. (O. B. p. 73.)

Second: The charge on Communism is sought to be defended as having been necessary to eliminate that question from the case. (P. B. pp. 42-4.) But that was not what the jury were told. They were informed that they were to bear in mind the stated principles relating to the Communist Party "in judging whether the conduct of the plaintiff was as charged by the defendant . . ." [R.

915-916.] That being so, the legal status of the Party should have been correctly defined, not erroneously and incompletely as was in fact the case. (O. B. pp. 74-77.)

B. The Pre-Trial Order Precluded the Trial Court From Charging the Jury Relative to Waiver.

Plaintiff argues that because the pre-trial order contained a stipulation that plaintiff had duly performed all "writing" services until about December 2, 1947, and defendant until that date had met all its obligations under the employment contract, the instructions of the court and the interrogatory relative to waiver were proper. In effect plaintiff contends that this stipulation created or reserved the issue of waiver. It is so obvious that the elements essential to such an issue are not incorporated in the stipulation that we do not extend our argument beyond reference to Opening Brief pages 78-84 and 88-92. Since the issue was not presented by either the pre-trial order or the pleadings, there was no such issue.

Furthermore, if waiver so plainly appeared as a possible issue from the stipulated facts, why was it not included in the specification of issues remaining to be determined? Obviously, because it was an afterthought.

Contrary to plaintiff's assertion (P. B. p. 45) we do *not* concede that the evidence on the issue of waiver was without conflict. Those portions of the evidence *to which the trial court directed the jury's attention and with respect to which it framed the charge* were not contradicted. But there was other evidence, to which the jury's attention was *not* called and on the legal effect of which the charge was silent, which would have furnished adequate support for a finding of non-waiver. (O. B. pp. 80-83.)

- C. The Instruction Dealing With Declarations Prior to the Hearing of Defendant's Attitude Towards Plaintiff's Political Beliefs Was Not Directed to the Question of Whether Plaintiff Had Breached His Contract and Had It Been So Directed Would Still Have Been Prejudicial.
- D. The Charge Gave Undue Prominence to the Evidence of Plaintiff on Waiver, at the Same Time Minimizing and Omitting to Mention Defendant's Opposing Theory and Evidence.

The foregoing statements are supported in Opening Brief at pages 85-93 and 93-94 respectively by matter directly responsive to the contrary arguments presented in Plaintiff's Brief pages 45-55.

- E. On the Subject of Plaintiff's Conduct the Instructions Were Contradictory and Inconsistent With Each Other in Respect of Plaintiff's Obligations Under Paragraph 5 of the Employment Contract.

Plaintiff argues that (1) because, in response to defendant's objection that various instructions failed to state that defendant need show only that plaintiff's conduct *tended* to produce certain reactions, the court corrected *some* of the instructions, the error was fully cured and (2) because, after the court had so acted, the defendant did not repeat its objections to the uncorrected instructions, the objection was waived. (P. B. 56-58.)

As to plaintiff's proposition (1), we refer to Opening Brief pages 101-104 as a complete justification of defendant's contention that the error was not cured.

As to plaintiff's proposition (2) we direct attention to the fact that after the partial corrections the court asked

for "any additional exceptions which are not already in the record." Defendant had stated his objections "*in the record,*" had no "*additional*" objections and had a right to assume that the court had made all the changes which the court would make in response to the objections.

The failure to request an instruction on waiver did not preclude the right to object to an erroneous instruction actually given on that subject at the request of the other party or on the court's own motion. (*St. Paul F. & M. Ins. Co. v. Bachmann*, 285 U. S. 112, 118-19, 76 L. Ed. 648, 653-4, 52 S. Ct. 270.) Such a failure would only preclude the right to object to an entire absence of any instruction on the issue.

F. The Instructions Did Not Recognize the Right of an Employer to Justify on Any Ground Existing at the Time of His Action, Whether or Not Then Specified.

Plaintiff's argument to the contrary (P. B. pp. 59-61) is fully met in Opening Brief pages 104-105, where it is also pointed out that the right to terminate the contract or plaintiff's compensation accrues in the event of "the failure, refusal or neglect of the employee to perform his required services *or observe any of his obligations.*"

2. The Charge on the Rights of Witnesses Was Error for the Reasons Set Out in O. B. pp. 95-100 Where the Answer Will Be Found to Plaintiff's Contrary Argument (pp. 61-63).
1. Since Courts Will Take Judicial Notice That a Large Part of the American Public Looks With Scorn and Contempt on Persons It Believes to Be Communists, the Jury Should Have Been So Instructed. (O. B. pp. 106-109.)

Stripped of a good deal of language plaintiff's reply to the foregoing is an insistence that the single statement in the instructions that "In California it is libelous to call a person a Communist" (which statement was in the midst of various other instructions concerning the law of libel), was a sufficient compliance with defendant's request for an instruction in line with the contention stated in the heading. (P. B. pp. 64-65.) Defendant's answer to this will be found as indicated in the heading and at Opening Brief pages 70-77 defendant presents its broader contentions that the instructions under the designation "The Question of Communism" constituted prejudicial error.

The "objections" appearing at Opening Brief pages 108-9 which plaintiff says were waived (P. B. p. 65) are in fact merely arguments or reasons why the charge on the law of libel was not the equivalent of our requested instruction on judicial notice which the trial court refused to give. In so far as these reasons were also the basis of an objection to the charge on libel, they were adequately raised in the trial court. (O. B. p. 64, *Cal-Bay Corp. v. U. S.* (C. C. A. 9), 169 F. 2d 15, 18-19, *cert den.* 335 U. S. 859; *Hindman v. First Nat. Bank* (C. C. A. 6), 112 Fed. 931, 934, *cert. den.* 186 U. S. 483; *Swiderski v. Moodenbaugh* (C. C. A. 9), 143 F. 2d 212, 213.)

VIII.

The Trial Court Erred to the Prejudice of Defendant in Its Rulings on the Admission and Exclusion of Evidence. (O. B. pp. 110-121.)

It is believed that the matter in plaintiff's brief (pp. 66-81) relative to defendant's above-stated contention has been adequately dealt with in that portion of the Opening Brief above indicated.

The claim that the editorials were not offered in evidence (P. B. p. 73) cannot withstand a reading of the proceedings cited in the specification of error. [O. B. pp. 41-2. See also, R. 825; and Typewritten Transcript, p. 1021, lines 2-11.] The trial court indicated emphatically that no testimony along that line would be received, not because of any defect in the offer, but because of the supposed immateriality of the evidence. In such circumstances no formal offer of proof is necessary. (*McCandless v. U. S.*, 298 U. S. 342, 347-8, 80 L. Ed. 1205, 1208-9, 56 S. Ct. 764; *Lawless v. Calaway*, 24 Cal. 2d 81, 91, 147 P. 2d 604, 609; *Tomaier v. Tomaier*, 23 Cal. 2d 754, 760, 146 P. 2d 905, 908; *Caminetti v. Pac. Mut. L. Ins. Co.*, 23 Cal. 2d 94, 100, 142 P. 2d 741, 744; *Heimann v. City*, 30 Cal. 2d 746, 757, 185 P. 2d 597, 604.)

IX.

The Cause Should Have Been Transferred to Another Judge Because of the Trial Judge's Personal Bias and Prejudice. (O. B. pp. 122-126.)

It is believed that the matter in plaintiff's brief (pp. 82-85) relative to defendant's above-stated contention has been adequately dealt with in that portion of the Opening Brief above indicated. It may be added that the preconceived opinion of the trial judge to which objection has been taken was not merely an impersonal opinion of abstract law; it was a complete conclusion on, and a pre-judgment of, the merits, *factual as well as legal*, of the defendant's case.

Respectfully submitted,

IRVING M. WALKER,

HERMAN F. SELVIN,

Attorneys for Appellant.

No. 12227

United States
Court of Appeals
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

CECELIA J. WILSON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Eastern Division

FILED

MAY 31 1949

PAUL P. O'BRIEN,
CLERK



No. 12227

United States
Court of Appeals
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

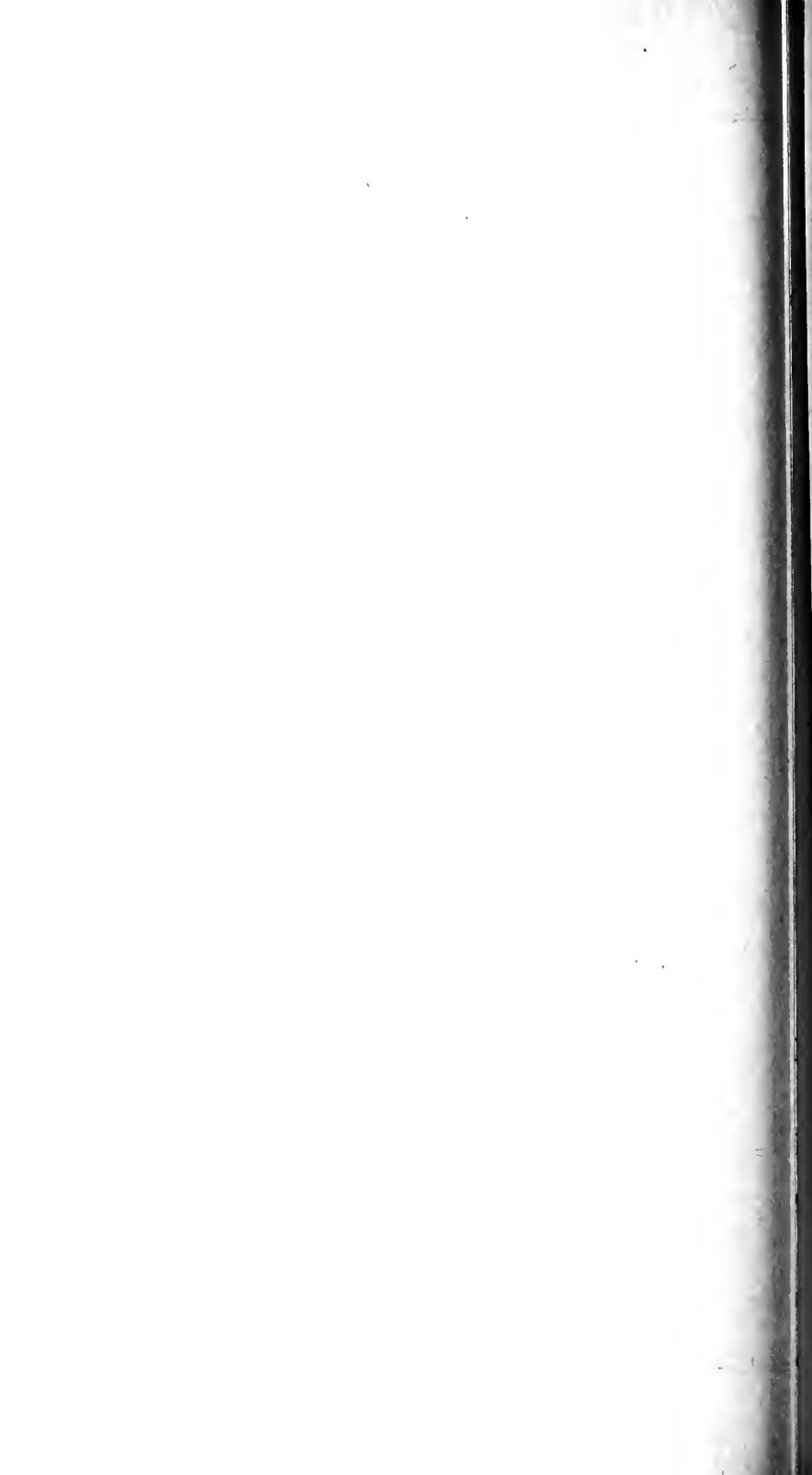
vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Eastern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Beeman, Dr. Joseph

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Graves, Dr. Melvin M.

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—direct (Mr. Merrill) 150

Pittenger, Dr. F. A.

—direct 164

Stewart, James L.

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Swindell, Dr. O. F.

—direct 159

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Brothers, W. W.

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—recross (Mr. Eberle) 113

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Plaintiff and Appellant.

J. L. EBERLE,

Boise, Idaho,

A. L. MERRILL,

Pocatello, Idaho,

Attorneys for Defendant and Appellee.

In the District Court of the United States for the
District of Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation of New York,

Defendant.

COMPLAINT

Plaintiff Complains of Defendant and Alleges:

I.

That Plaintiff is a citizen and resident of the State of Idaho; that defendant is a New York Corporation; that the matter in controversy exceeds exclusive of interest and costs, the sum of \$3,000.00.

II.

That on or about the 19th day of May, 1928, the defendant issued to Harry H. Wilson, now deceased, its certain policy of insurance, being Policy No. 102 55 251 the policy insuring the insured for \$5,000.00, payable to his beneficiary upon proof of his death, and \$10,000, or double the face of said policy if death resulted from accident; that said policy provided for the payment of an annual premium which was paid each and every year by the deceased up until the time of his death on the 8th day of April, 1947; that the defendant is familiar with all the terms and provisions of said policy and is familiar with the fact of the death of the deceased and the circumstances surrounding the same.

III.

That there was and is due to the plaintiff, the beneficiary under said policy, the sum of Five Thousand Dollars, with interest thereon at six per cent per annum from the 8th day of April, 1947, by reason of the death of the deceased, her husband, caused by accidental means, which sum the defendant has at all times refused to pay. [1*]

Wherefore, plaintiff prays that she have and recover judgment against the defendant in the sum of \$5,000.00 with interest thereon at six per cent per annum from the 8th day of April, 1947, for all costs of suit herein expended and plaintiff prays for general relief.

/s/ B. W. DAVIS,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 7, 1947. [2]

[Title of District Court and Cause.]

MOTIONS TO DISMISS, AND FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. That on account of the insufficiency of the facts in the complaint in the above-entitled cause it is im-

* Page numbering appearing at foot of page of original certified Transcript of Record.

possible to fully or properly answer the same without greater particularity as to the nature and character of the claims of the plaintiff, and therefore this defense moves this honorable Court under Rule 12 (a) of the Federal Rules of Civil Procedure for an order requiring plaintiff to make a more definite statement of the nature of his claim or provide defendant with a bill of particulars as to certain matters in the complaint in the following respects:

(a) That the pertinent terms of the policy are not set forth and it is impossible to ascertain whether plaintiff's claim is within the terms of such policy.

(b) That it is impossible to ascertain what proof, if any, of death plaintiff has made.

(c) That it is impossible to ascertain the accidental means relied upon by plaintiff in connection with her allegations that death was caused by accidental means. [3]

Defendant further moves this honorable Court that if such more definite statement of the nature of plaintiff's claims or bill of particulars be not filed within ten days from the entry of the order herein and copies served upon defendant's counsel within such time, or being so filed and served are incomplete, insufficient, evasive or not responsive, the complaint as amended be dismissed at plaintiff's costs; and further, if any matters are included in such said particulars and not relied upon at the trial of plaintiff, the defendant recover the costs and expenses incurred in preparing to meet the allegations contained in said parts not used.

Defendant further moves that the time within

which defendant may file an answer or other pleadings or otherwise move with respect to the complaint be extended until twenty-five days after the bill of particulars herein mentioned is served upon defendant's counsel or twenty days after final decision of this motion is made.

That each of the above and foregoing motions is a separate motion and each of such motions is made upon the files and records in the above-entitled cause.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ Illegible,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 26, 1947. [4]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JAN. 13, 1948

After hearing respective counsel on Motion to Dismiss, for More Definite Statement or for Bill of Particulars, the Court announced that all Motions will be denied, and defendant will be given 20 days to Answer.

Jan. 13, 1948.

[Title of District Court and Cause.]

ANSWER

For Answer to the Complaint of the Plaintiff Herein:

I.

Defendant admits that plaintiff is a citizen and resident of the State of Idaho; that defendant is a

New York corporation; that the matter in controversy exceeds, exclusive of interest and cost, the sum of Three Thousand Dollars (\$3,000.00); that Harry W. Wilson died on or about April 8, 1947; that on or about May 19, 1928, defendant issued to said Harry H. Wilson an insurance policy numbered 10255251, but denies that said policy of insurance contains any terms of provisions other than those contained in the policy of insurance in writing, delivered by defendant to said Harry H. Wilson.

II.

Denies each and every of the allegations in said Complaint and each and every paragraph therein contained excepting as hereinbefore specifically admitted.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ Illegible,

Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 31, 1948. [5]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF MAR. 17, 1948

This cause came on regularly for trial, B. W. Davis representing the plaintiff and J. L. Eberle the defendant.

It was stipulated by respective counsel that the premiums were paid and the insurance policy was in full force at the time of the death of Harry H. Wilson.

It was stipulated by respective counsel that the testimony given in case No. 1462 by Drs. O. F. Call, W. W. Brothers and Melvin Graves would also run to this cause of action.

It was stipulated that the depositions of Dr. Joseph Beeman, Dr. F. A. Pittenger, Dr. James L. Stewart and Dr. O. F. Swindell be copied into the record.

The Court ordered that argument be submitted on briefs, the plaintiff being granted 20 days for opening brief, defendant 20 days thereafter to reply, and plaintiff 15 days to reply to reply brief. The time for filing briefs to commence the date of filing of the transcript of testimony.

[Title of District Court and Cause.]

MOTION TO AMEND ANSWER

Comes now the defendant above named and moves the Court that it may be granted leave to amend its answer herein by adding thereto the following paragraph, namely:

III.

That plaintiff cannot recover because the death of said Harry H. Wilson resulted in such manner as to be within the following exclusions of said policy, to wit:

“DOUBLE INDEMNITY

“The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury

effected solely through external, violent and accidental means and occurred within ninety days after such injury.

“Double Indemnity shall not be payable if the Insured’s death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

“Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under “Surrender Values,” or to any Dividend Additions provided under ‘Participation in Surplus—Dividends.’

“The total premium stated on the first page hereof includes a Quar. annual premium of \$1.35 for the Double Indemnity Benefit.”

Dated September 22, 1948.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

Attorneys for Defendant. [7]

[B. W. Davis Letterhead]

September 28, 1948

Richards & Haga, Attorneys,
Boise, Idaho.

Attention: Mr. J. L. Eberle

In re: Wilson v. New York Life Ins. Co.

Dear Mr. Eberle:

I have your letter of the 22nd inst. and it is not difficult for me to answer you at all.

If the amendment you seek to make does you no benefit and in no way hurts me, I am perfectly willing for you to make it. If not and it helps you any, I do not want to agree.

Inasmuch as it has been pleaded in the other case, I would not want you to be placed in an adverse position if it really makes any difference, so I guess you may file it, but please do it at once and do not ask me to do it again. I am sure I made a tremendous mistake in this case by following the suggestions of you fellows.

Yours sincerely,

/s/ B. W. DAVIS.

D/g

[Endorsed]: Filed Sept. 29, 1948. [8]

[Title of District Court and Cause.]

ORDER TO AMEND ANSWER

On motion of defendant to amend its answer herein, and no objections have been offered thereto by plaintiff, it is hereby Ordered that the answer of the defendant herein be, and hereby is, amended by adding to such answer the following paragraph, to wit:

That plaintiff cannot recover because the death of said Harry H. Wilson resulted in such manner as to be within the following exclusions of said policy, to wit:

“DOUBLE INDEMNITY

“The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

“Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of acciden-

tal and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

“Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under “Surrender Values,” or to any Dividend Additions provided under ‘Participation in Surplus—Dividends.’

“The total premium stated on the first page hereof includes a Quar. annual premium of \$1.35 for the Double Indemnity Benefit.”

Dated September 29th, 1948.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed Sept. 29, 1948. [9]

[Title of District Court and Cause.]

OPINION—February 2, 1949

Ben. W. Davis, Esq., of Pocatello, Idaho, Attorney for Plaintiff.

A. L. Merrill, Esq., Pocatello, Idaho; J. L. Eberle, Esq., Boise, Idaho, Attorneys for the Defendant.

Clark, District Judge.

The Plaintiff Cecilia J. Wilson brought this action to recover for the alleged accidental death of her husband, Harry Wilson.

Harry Wilson, the deceased, was a resident of the State of Idaho at the time the defendant New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1928, issued

its certain policy of insurance, being policy No. 10255251, the policy insuring the insured for \$5,000.00 payable to his beneficiary upon proof of his death and \$10,000.00 or double the face of the policy if death resulted from accident. This action is for the recovery of the double indemnity of \$5,000.00 for the alleged accidental death.

The policy provided for double indemnity if "the death of the Insured resulted directly and independently of all other causes from bodily injury affected solely through external, violent and accidental means * * *." "Double indemnity shall not be payable if the insured's death resulted * * * directly or indirectly from illness or diseases or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury * * *"

The insured died on the 8th day of April, 1947, from "acute pulmonary embolism." This is defined at page 12 of the [10] transcript of the testimony, by Doctor O. F. Call, attending physician at the time of Mr. Wilson's death, as a "foreign substance or piece of a clot flowing in the blood stream which goes through the heart, through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance."

The circumstances preceding Mr. Wilson's death as disclosed by the evidence, are as follows: He was in ordinary good health of the average man; he was about sixty years of age; he was troubled to some extent by high blood pressure. He had undergone an

operation some years ago for a bowel obstruction; the record does not disclose when this operation was performed but it was prior to an operation for hernia that was performed some four years prior to his death. On the morning of April 7, 1947, he was again operated upon for recurrent inguinal hernia. Immediately following the operation he was returned to his room in the hospital in apparently good condition. After the operation on the morning of April 7, opiates and sedatives were administered, which were a part of standard and recognized treatment. The opiotes so administered caused deep heavy snoring, choking and coughing and although Mr. Wilson was a heavy snorer when sleeping under natural conditions, this medication caused the choking and coughing and snoring to become more violent, causing the pulmonary embolism from which death resulted at 5 o'clock a.m. April 8, 1947, about twenty hours after the operation. The result of the administration of the opiates was entirely unforeseen and unexpected; there was nothing to indicate, at the time of their administration, that he would develop this extraordinary condition snoring or heavy breathing and the coughing and choking causing the embolism. Doctor Call testified that in his experience in operations this condition that developed in reference to the snoring, choking and breathing was most extraordinary and not to be expected or foreseen; the [11] record discloses the following questions and answers in the testimony of Doctor Call:

“Q. I call your attention to the definition in Webster’s International Dictionary of accident; that de-

finer an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation?

A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

Q. Was it a mishap? A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation?

A. That's right.

Q. Was it undesigned? A. It was. [12]

Q. Was it a chance? A. It was.

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

The deceased died unexpectedly, there was nothing in his operation, and he gave no indicative history or evidence that the calamity that befell him was likely to happen.

Plaintiff having established the death was accidental the burden shifts to the defendant and it must allege and prove that recovery is barred by the limitations qualifying the general clause hereinbefore set forth.

“Where the insurer seeks to avoid liability by reason of an alleged breach of the condition of the policy, the burden rests upon it to show such breach; and, where it seeks to avoid liability on the ground that the accident or injury is within one of the exceptions in the policy, the burden rests upon it to prove facts bringing the case within the exception.”
O’Neil v. New York Life Insurance Co., 152 Pac (2) 707 at page 711.

In meeting this burden it must be remembered that the limitation clause is to be construed most favorable to the insured. The rule is that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon [13] the meaning of an accident policy, one of which will permit the insured to recover and the other not permit-

ting such recovery that the policy must be construed so as to permit recovery. The most widely cited rule is the one set forth by Ex-President and Former Chief Justice Taft, (Court of Appeals 6th Circuit) in the case of *Manufacturer's Accident Indemnity Co. v. Dorgan* 58 Fed. 945, he said: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." This statement has been cited with approval by the Court of appeals of this, the Ninth Circuit in the case of *Jensma v. Sun Life Assurance Co., of Canada et al.*, 64 Fed(2) page 457.

Recovery in this case depends on the limitation in the policy hereinbefore set forth. The term *Accidental* means in some jurisdictions has been held to clearly limit the policy's meaning to cause alone, however the better rule and the rule followed in this jurisdiction is that the term "accidental means" and the term "accidental results" and "accidental death" are regarded as legally synonymous. *Jensma v. Sun Life Assurance Co., of Canada et al.*, *supra*. *Ranert v. Loyal Protective Insurance Co.* (1940) 61 Idaho

677, 106 Pac 2nd 1015; *O'Neil v. New York Life Insurance Co.*, *supra*.

We have here a result that was unforeseen, the opiates were introduced into the body of the insured without any thought that such a result would follow, the result being unforeseen and wholly unexpected and unanticipated. [14]

Death is inevitable, every man lives more happily and secure if he feels that he has insurance to take care of those who are near and dear to him, after he has departed this life. It is well known, as suggested in the case of *Ranert v. Loyal Protective Insurance Co.*, *supra*, that the ordinary man is not versed in the construction of contracts. He simply says to the life insurance agent, "I want this security for my family" he does not prepare, nor does he have his lawyer prepare the written contract; he pays the money for this insurance. The contract is prepared beforehand by the insurer. I think it can be said without contradiction that the provisions of the policy are not discussed, they simply tell the agent the protection they desire. The policy is all written out in printed form and following the main provisions of the policy the limitations are provided. In other words, the first part of the policy gives and the second part of the policy takes away, and the ordinary person who is not trained to interpret contracts is generally not in a position to understand the details, terms and meanings of the limitations. In fact, as is so often said, the insured seldom sees the policy until it has been issued and delivered to him and then after he receives it he puts it in his desk or safe and the

first time it is read is by his beneficiaries after his death. Many of its terms and all of its defenses and super limitations are difficult to understand. If justice is to be done the courts must adopt a rule of construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premiums were paid.

This Court follows that rule not only because it is the rule in this jurisdiction but because it is the just rule.

The Court is of the opinion that the defendant has failed to bring itself within the exception relied upon to defeat recovery and is further of the opinion that the result that followed the administration of the opiates was not natural or probable and should not reasonably have happened and under all the circumstances the result was tragically out of proportion [15] to the trivial cause, and that the plaintiff is entitled to recover under the terms of the policy.

The plaintiff's counsel may prepare the necessary findings, conclusions and judgment to conform with this opinion, copy will be served on counsel for the defendant and the original presented to the Court for approval.

[Endorsed]: Filed Feb. 3, 1949. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having heretofore been submitted to the Court without a jury by agreement of counsel for the respective parties upon issues framed by plaintiff's complaint and the Answer of the defendant as amended, and evidence having been submitted on behalf of plaintiff and defendant and written briefs having been prepared and filed by the respective parties and the Court having carefully considered said briefs and the evidence in said cause and having heretofore, on the 2nd day of February, 1949, made and filed its written opinion, the Court now makes the following

FINDINGS OF FACT

I.

That plaintiff, at all times from and after the filing of her complaint, up to and including the time that said matter was fully submitted to the Court, was a resident of the State of Idaho and during said time the defendant was a New York corporation and that the sum in controversy exceeds exclusive of interest and costs, \$3,000.00.

II.

That the defendant, New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1928, issued to Harry H. Wilson, then living and a resident of the State of Idaho, its certain policy of insurance, being Policy 10255251, payable to his beneficiary upon proof of his death

\$5,000.00 and \$10,000 or double the face of said policy if death resulted from accident. That said [17] policy was issued for a premium to be paid yearly and that all of the premiums due under and by virtue of the terms of said policy were paid by the insured during his life time.

III.

That Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

IV.

That prior to the accidental death of Harry H. Wilson, who was past sixty-one years of age, he was in the ordinary good health of the average man.

V.

That he was operated on for hernia on the 7th day of April, 1947, and that prior thereto he was given a careful examination by a skilled physician and surgeon, who was a man of broad experience in his profession and who was a competent and experienced surgeon. That there was no indication that the patient at that time was not in good physical condition and the proper subject of a simple hernia operation.

VI.

That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation.

VII.

That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring, which caused and re-

sulted in an embolism, causing the death of the insured.

VIII.

That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of the said insured. [18]

IX.

That the coughing, choking and snoring of the patient was extremely violent, extraordinary, not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions.

X.

That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attendant physician; that the result thereof, causing the violent choking, snoring and coughing was tragically out of proportion to the trivial cause and was an accident and resulted in death by accident.

XI.

That the opiates and sedatives administered to the insured prior to his death, were externally administered.

XII.

That the facts fail to disclose and the defendant did not prove under Paragraph III of its Amended Answer that the exclusions of the policy as therein set out were the proximate cause or that the deceased died directly or indirectly from infirmity of mind or body, from illness or diseases or from any bacterial

infection, other than bacterial infection occurring in consequence of accidental and external bodily injury.

XIII.

That the plaintiff has sustained the material allegations of her complaint, that the death of the deceased was accidental and that the defendant has failed to sustain the allegation of its affirmative defense that the death of Harry H. Wilson resulted in such manner as to be within the exclusions of the said Policy.

CONCLUSIONS OF LAW

I.

That Plaintiff having proven and established the accidental death of the deceased within the terms of the insurance policy described in plaintiff's complaint, is entitled to a judgment as [19] prayed for.

II.

That the defendant has failed to establish facts showing that the death of the deceased was within the exclusions of its policy.

III.

That the plaintiff is entitled to a judgment in accordance with the prayer of her complaint for \$5,000.00 with interest thereon at 6% per annum, the legal rate in the State of Idaho, from the 8th day of April, 1947.

Dated this 21st day of March, 1949.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed Mar. 21, 1949. [20]

In the United States District Court, District of
Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation of New York,

Defendant.

JUDGMENT

The above-entitled cause having been tried and submitted to the Court sitting without a jury by agreement of counsel for the respective parties, upon issues framed by plaintiff's complaint and the Answer of the defendant as amended, the plaintiff appearing in person and by her attorney, B. W. Davis of Pocatello, Idaho, and the defendant appearing by its counsel, J. L. Eberle of Boise, Idaho, and plaintiff and defendant having introduced evidence and the Court having taken the matter under advisement and having carefully considered the evidence and the written briefs submitted by the respective parties in support of their contentions and the Court having heretofore filed and entered a written Opinion and made and filed Findings of Fact and Conclusions of law;

It Is Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendant, the sum of \$5,000.00 with interest thereon at 6% per annum from the 8th day of April, 1947, amounting to

\$553.33, a total judgment of \$5,553.33, to which shall be added \$21.20, plaintiff's costs of suit when taxed herein, and that plaintiff may have execution therefor.

Dated this 21st day of March, 1949.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed March 21, 1949. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that New York Life Insurance Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from the final judgment entered in this action on the 21st day of March, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [22]

[Title of District Court and Cause.]

**SUPERSEDEAS BOND UPON APPEAL TO
CIRCUIT COURT OF APPEALS**

Know All Men By These Presents that New York Life Insurance Company, a corporation, as Principal, and American Bonding Company, a corporation, of Baltimore, Maryland, as Surety, are held and firmly bound unto Cecelia J. Wilson, plaintiff above named, in the sum of Six Thousand Dollars (\$6,000.00) to be paid to the said Cecelia J. Wilson or her attorney, successors or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 28th day of March, 1949.

Whereas on the 21st day of March, 1949, in the above-entitled action in the District Court of the United States for the District of Idaho, Southern Division, between Cecelia J. Wilson, plaintiff above named, and said New York Life Insurance Company, a corporation, defendant above named, a judgment was rendered against said defendant and the said defendant has duly filed a notice of appeal from said judgment.

Now, the condition of this bond is that if said New York Life Insurance Company, a corporation, shall prosecute his appeal with effect and satisfy the said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full or such modification of the judgment and such costs, interest, and

damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE
COMPANY, CORPORATION,

By /s/ J. L. EBERLE,
/s/ B. S. VARIAN,
/s/ DALE O. MORGAN,
Its Attorneys.

AMERICAN BONDING
COMPANY,

By /s/ HERBERT H. EBERLE,
Attorney in Fact.

Countersigned by:

(Seal) /s/ HERBERT H. EBERLE,
Resident Agent.

[Endorsed]: Filed March 28, 1949. [23]

[Title of District Court and Cause.]

MOTION AND ORDER STAYING PROCEED-
INGS PENDING APPEAL

The defendant herein, New York Life Insurance Company, a corporation, having filed herein a supersedeas bond, executed by itself as principal and American Bonding Company, a corporation, as surety, in the penal sum of Six Thousand Dollars (\$6,000.00) said defendant moves that said supersedeas bond be approved and that the execution and enforcement of the judgment entered herein on March 21, 1949, be stayed until the final dis-

position of the appeal taken by the said defendant therefrom to the Circuit Court of Appeals for the Ninth Circuit.

March 28th, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant.

ORDER

On motion, and good cause being shown therefor, it is hereby Ordered that the supersedeas bond dated March 28th, 1949, filed herein by defendant New York Life Insurance Company, a corporation, and executed by said defendant as principal and American Bonding Company, a corporation, as surety, in the penal sum of Six Thousand Dollars (\$6,000.00) be and hereby is approved and the execution and the enforcement of the judgment made and entered herein on March 21, 1949, be and hereby is stayed until the final disposition of the appeal taken by said defendant therefrom to the Circuit Court of Appeals for the Ninth Circuit.

March 28th, 1949.

/s/ CHASE A. CLARK,

District Judge.

[Endorsed]: Filed March 28, 1949. [24]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

New York Life Insurance Company, a corporation, appellant herein, designates the complete record and all proceedings and evidence in the above-entitled action to be contained in the record on appeal and the Clerk will please prepare such record on appeal herein, including, but not limited to, the following:

1. Complaint filed November 7, 1947.
2. Motion to dismiss and for more definite statement or bill of particulars.
3. Minute entry denying motions filed January 13, 1948.
4. Answer of defendant, filed January 31, 1948.
5. Minute entry of March 17, 1948.
6. Motion to amend answer.
7. Order amending answer filed September 29, 1948.
8. Transcript of the evidence filed August 19, 1948.
9. All exhibits.
10. Opinion of Court dated February 2, 1949, filed Feb. 3, 1949.
11. Findings of fact and conclusions of law, dated Feb. 21, 1949.
12. Judgment dated February 21, 1949.
13. Notice of appeal.
14. Supersedeas bond.
15. Motion and order staying proceedings pending appeal.

16. This designation.
17. Statement of Points.

March 28th, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Appellant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [25]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Appellant states that the points upon which it intends to rely on the appeal in the above-entitled action are as follows and that it deems the entire record on appeal as necessary for consideration of the points so to be relied upon, to wit:

1. That the court erred in finding and holding that the death of the insured, Harry H. Wilson, resulted directly and independently of all other causes from bodily injury, effected solely through external, violent and accidental means.

2. The court erred in not finding and holding that the death of the insured, Harry H. Wilson, resulted directly or indirectly from infirmity of mind or body, from illness or disease.

3. The court erred in finding and holding that the death of the insured, Harry H. Wilson, was caused by choking or coughing or violent snoring, extraordinary, not to have foreseen, beyond

the experience of attending physicians, and resulted in an embolism, causing the death of the insured, the same being unsupported by, and contrary to, the evidence, said insured having had previous operations, and such snoring, coughing and choking as he had being normal, no different than ordinary, and the physical condition, habits and tendencies of insured fully known to attending physician.

4. The court erred in finding and holding that the insured, Harry H. Wilson, was in ordinary good health of the average [26] man, the same being unsupported by, and contrary to, the evidence; the fact being as shown by such evidence, that said insured had a bodily infirmity and disease and certain habits and tendencies well known to the attending physician.

5. That the court erred in finding and holding that prior to the hernia operation, said insured Harry H. Wilson, was given a careful examination and that there was no indication that the patient was not in good physical condition, appeared normal following the operation, did not suffer any shock, and did not die as a result of said hernia operation, the same being unsupported by, and contrary to, the evidence, particularly in that said insured had previously had several operations and that his physical condition was such that death resulted from, or was contributed to by, infirmity of mind or body, from illness or disease, and not directly and independently from bodily injury, solely through accidental means.

6. That the court erred in finding and holding

that insured was given sedatives and opiates which caused violent coughing, choking and snoring which unexpectedly and accidentally caused his death, and he died of accident or by accidental means, the same being unsupported by, and contrary to, the evidence in that the evidence showed that he did not die of accident or by accidental means, the snoring, coughing, and choking referred to following relaxation from an opiate or sedative was normal in the case of the insured, no different than under ordinary conditions, which was well known to the attending physician and not unexpected or unforeseeable.

7. That the court erred in finding and holding that the administration of opiate or sedative caused violent choking, snoring or coughing tragically out of the proportion to the trivial cause and was accidental, resulting in the death of the insured, [27] the same being unsupported by, and contrary to, the evidence and particularly in that, according to the evidence, the snoring, coughing and choking of the insured was normal, usual and not disproportionate, well known to the attending physician and did not result in the death of insured.

8. The court erred in failing and declining to hold, inaccordance with the evidence, as follows:

(a) In not finding and holding that there was nothing unexpected in the snoring and coughing of the insured as part of the post-operative procedure and that the same was not unusual or unforeseen.

(b) In not finding and holding that the insured

had an existing diseased venous system and bodily infirmity at the time of the hernia operation and that the attending physician had full knowledge of such physical condition and of insured's habits.

(c) In not finding and holding that insured's death was the probable result of an existing bodily infirmity and disease.

(d) In not finding and holding that the insured had no idiosyncrasies or hypersusceptibility unknown to himself or his physician.

(e) In not finding and holding that the opiate or sedative involved produced relaxation in accordance with the only purpose and object thereof and caused no injury whatsoever to insured.

(f) In not finding and holding that plaintiff did not show that the opiate or sedative in fact caused any bodily injury to insured.

(g) In failing to find and hold that an opiate or a sedative as proper post-operative procedure allayed pain and relaxed body, thereby inducing sleep, had such an effect and no other, and that there was no uncommon or unusual reaction to such opiate by reason of any allergy, hypersusceptibility or any other cause. [28]

(h) In failing to find and hold that the sedative or opiate did not cause snoring, coughing or choking, but only induced sleep and when insured slept he always had certain snoring habits, which in the case at bar were no different from those of any other time.

(i) In not finding and holding that insured's ac-

tions during operation and subsequent thereto were no different than in ordinary life.

(j) In not finding and holding that post-operative pulmonary embolism is foreseeable, expected, anticipated, and the natural and probable result of surgical procedure, particularly in the case of said insured.

9. The court erred in concluding that the death of the insured was accidental within the terms of the policy referred to in plaintiff's complaint and that plaintiff was entitled to judgment, such conclusion not being sustained by, and contrary to, the evidence which clearly showed that plaintiff did not prove insured received a bodily injury which was effected solely through external, violent and accidental means, that such injury was a direct cause of the death of insured, independently of all other causes, and that the same was not the result directly, or indirectly, from infirmity of mind or body or from illness or disease.

10. The court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of \$5,553.33, plus costs, under date of March 21, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Idaho,
County of Ada—ss.

Irene R. Pinsonault of said county, being duly sworn, deposes and says: That she is a citizen of the United States, over twenty-one (21) years of age, and not a party to the above-mentioned action; and is employed in the office of J. L. Eberle, B. S. Varian and Dale O. Morgan, attorneys at law, Boise, Idaho, as a stenographer, and that on the 28th day of March, 1949, she deposited in the United States Postoffice at Boise, Ada County, State of Idaho, an envelope duly addressed by United States mail to B. W. Davis, Attorney for Cecelia J. Wilson, at Pocatello, Idaho, said envelope containing the following papers entitled in the above action: Notice of Appeal to Circuit Court of Appeals; Motion and Order Staying Proceedings Pending Appeal; Statement of Points; Designation of Record on Appeal; Supersedeas Bond upon Appeal to Circuit Court of Appeals; and that she paid the postage fee thereon in advance and that there is a regular communication by the United States mails between said postoffice of deposit thereof, as aforesaid, and said place of residence.

/s/ IRENE R. PINSONAULT.

Subscribed and sworn to before me this 28th day of March, 1949.

[Seal] /s/ J. L. EBERLE,

Notary Public for Idaho.

[Endorsed]: Filed March 28, 1949. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers:

1. Complaint.
2. Motions to Dismiss, and for More Definite Statement or Bill of Particulars.
3. Minutes of the Court of Jan. 13, 1948.
4. Answer (With Affidavit of Mailing attached).
5. Minutes of the Court of Mar. 17, 1948.
6. Motion to Amend Answer (Letter dated 9/28/48 from B. W. Davis to Richards & Haga attached).
7. Order to Amend Answer.
8. Transcript of the Evidence.
9. Exhibits: Plff's Ex. 1—New York Life Ins. Policy. Plff's Ex. 2—Photostatic copy letter dated 8/27/47 from Chairman, Committee on Death Benefits to B. W. Davis. Plff's Ex. 3—Deposition of Dr. O. F. Call with photographic copy of hospital record. Deft's Ex. 4—Photographic copy of Hospital record—H. H. Wilson.
10. Opinion.

11. Findings of Fact and Conclusions of Law.
12. Judgment. [31]
13. Notice of Appeal to Circuit Court of Appeals.
14. Superseadeas Bond Upon Appeal to Circuit Court of Appeals.
15. Motion and Order Staying Proceedings Pending Appeal.
16. Designation of Record on Appeal.
17. Statement of Points.
18. Affidavit of Mailing of Appeal Papers and that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of April, 1949.

[Seal]

ED. M. BRYAN,
Clerk. [32]

In the District Court of the United States, in and
for the District of Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, of New York,

Defendant.

TRANSCRIPT

This matter was tried before the Honorable
Chase A. Clark, sitting without a jury, at Pocatello, Idaho, on March 17, 1948, at 10 o'clock a.m.

Appearances: Ben W. Davis, Pocatello, Idaho,
Attorney for the Plaintiff. J. L. Eberle, Boise,
Idaho; A. L. Merrill, Pocatello, Idaho, Attorneys
for the defendant. [1*]

March 17, 1948

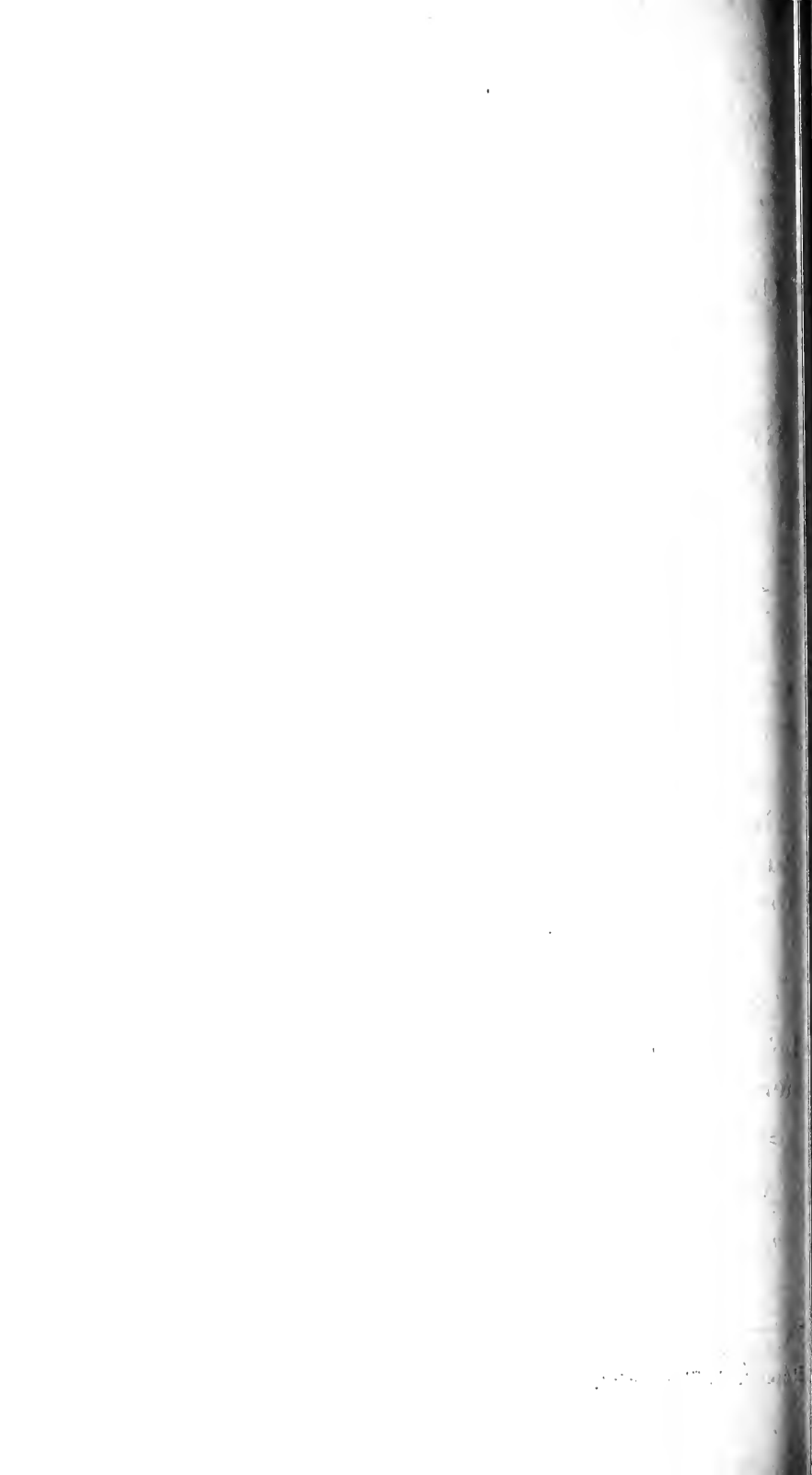
Mr. Davis: Now, I offer in evidence exhibit numbered one, which is the policy of insurance involved here.

The Court: Do you have any objection?

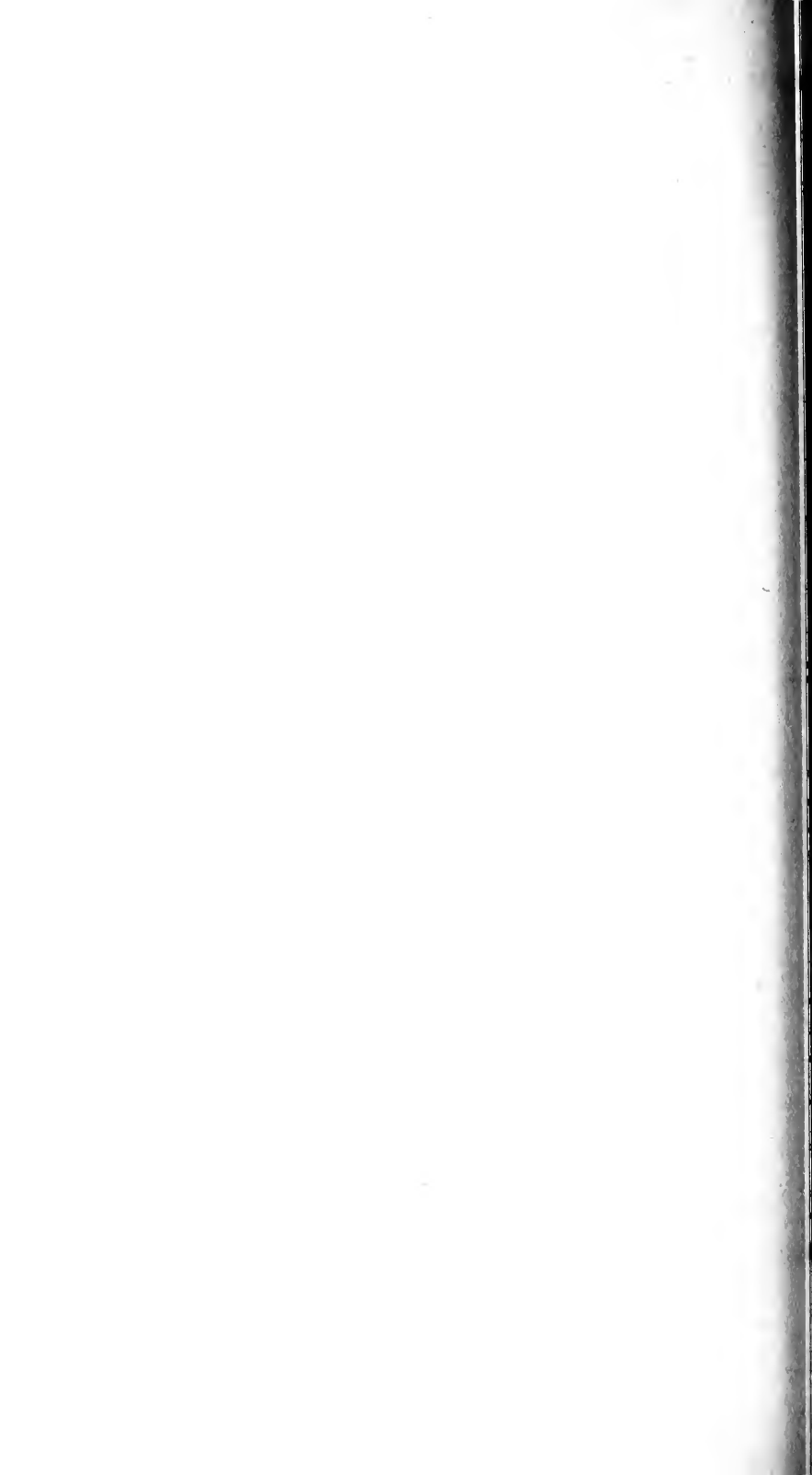
Mr. Eberle: None.

The Court: It may be admitted.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.







NEW YORK LIFE

INSURANCE COMPANY

A MUTUAL COMPANY

PAUL P. O'BRIEN

1463

AGREES TO PAY

PLAINTIFF'S EXHIBIT No. 1

MAR 17 1929

CECELIA J., WIFE OF THE INSURED ***

ADMITTED

Beneficiary

(with right on the part of the Insured to change the Beneficiary in the manner provided herein)

*** FIVE THOUSAND ***
(THE FACE OF THIS POLICY)

Dollars

upon receipt of due proof of the death of

*** HARRY E. WILSON ***

the Insured,

*** TEN THOUSAND ***
(DOUBLE THE FACE OF THIS POLICY)

Dollars

If such death resulted from accident as defined under "Double Indemnity" on the second page hereof and subject to the provisions therein set forth.

Either such sum will be increased by any outstanding dividend additions and dividend deposits as provided herein.

This contract is made in consideration of the payment in advance of the sum of \$ 48.25, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the NINETEENTH day of AUGUST nineteen hundred and TWENTY-EIGHT, and of a like sum on said date and every THREE calendar months thereafter during the life of the Insured.

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the NINETEENTH day of MAY nineteen hundred and TWENTY-EIGHT which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this NINETEENTH day of MAY nineteen hundred and TWENTY-EIGHT

Frederick M. Johnson
Secretary

Lawrence P. Kinglake
President

✓
925-71
O.L.
D.L.

Alfred J. Kinglake
Registrar

42
Examined

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

DOUBLE INDEMNITY

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane, from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation, aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

The total premium stated on the first page hereof includes a QUARTER annual premium of \$ 1.55 Double Indemnity Benefit.

PARTICIPATION IN SURPLUS—DIVIDENDS

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter, such surplus as shall have been apportioned by the Company to this Policy shall at the option of the Insured be either

- (a) Paid in cash; or
- (b) Applied toward payment of premiums; or
- (c) Applied to purchase a participating paid-up addition to the sum insured (herein referred to as Dividend Addition); or
- (d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate not less than three per cent compounded and credited annually. Such accumulated dividends (herein referred to as Dividend Payments) may be withdrawn in cash by the Insured on any anniversary of the Policy or shall be payable at the maturity of the Policy to the person entitled to its proceeds.

If no option is selected, the dividend will be applied to the purchase of a dividend addition to the sum insured. The Insured may surrender any dividend addition for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

DIVIDENDS MAY BE APPLIED TO DECREASE NUMBER OF PREMIUM PAYMENTS OR MATURE POLICY AS AN ENDOWMENT

Whenever the cash value of the Policy including the cash value of any dividend additions and dividend deposits shall equal the net single premium at the attained age of the Insured for a fully paid participating Policy of the same kind and amount as this Policy, calculated on the same basis as the premium on this Policy, the Company, upon written request of the Insured, will indorse this Policy as fully paid, whereupon the payment of premium will be discontinued; or, whenever said cash value shall equal the face amount of this Policy, the Company, upon due surrender of the Policy, will pay the face amount of the Policy in cash, less any indebtedness to the Company.

MISCELLANEOUS BENEFITS

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may from time to time change the beneficiary, unless otherwise provided by indorsement on this Policy or unless there be an existing assignment of this Policy. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change and by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change will relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured the interest in such beneficiary shall vest in the Insured, unless otherwise provided herein.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace period of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which the insurance continues in force. If death occurs within the period of grace the overdue premium will be deducted from the amount payable hereunder.

Interest Allowed at Settlement of Death Claims.—Interest will be allowed on the proceeds of the Policy payable as a death claim from date of receipt of due proof of death at any office of the Company until the date settlement is made at the Home Office. Interest shall be at the rate declared by the Company on such funds, but at a rate not less than three per cent per annum.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company. Upon payment of overdue premiums with five per cent interest thereon from their due date. Any indebtedness to the Company at date of default must be paid or reinstated with interest thereon in accordance with the loan provisions of the Policy.

Privilege of Change to Other Plans of Insurance.—At any time before default in payment of premium, provided the Insured is then less than 55 years of age, the Insured may, without medical re-examination, exchange this Policy for a Policy upon any plan of insurance having a higher rate of premium issued by the Company at the time this Policy was issued for the same amount as this Policy and containing the same Double Indemnity but without Disability Benefits. Such exchange shall be effective upon surrender of this Policy and the payment of the difference in premiums with interest at the rate of six per cent per annum from the due date of each premium to the date of exchange; allowance will be made for any larger cash dividends on the new plan. The new Policy will take effect as of the date of this Policy. The premium will be at the rate which would have been charged if the Policy had been originally issued on the new plan.

Residence, Travel and Occupation.—This Policy is free of conditions as to residence, travel, occupation, and any other service, except as provided herein under Double Indemnity.

Rights of Insured.—The Insured, during his lifetime, and without the consent of the beneficiary, may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, unless otherwise provided by indorsement hereon.

OPTIONAL METHODS OF SETTLEMENT

The Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy, in whole or in part, payable under one of the following options. Any such election or any change in election shall not take effect until indorsed on the Policy by the Company at its Home Office. The optional methods of settlement are available whether such proceeds are payable as a death claim or maturity as an Endowment, or upon surrender of the Policy for its cash value, provided the instalment or interest payment to the payee is not less than \$10.

Option 1.—The proceeds in whole or in part may be left with the Company subject to withdrawal at any time on demand in sums of not less than one hundred dollars. The Company will credit interest annually on the proceeds so left with such rate as it may each year declare on such funds, and guarantees that the rate shall be not less than three per cent.

Option 2.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period as may be agreed upon, in accordance with the following table.

Option 3.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period of five, ten or twenty years, as may be agreed upon, and for the remaining lifetime of the payee, in accordance with the following table.

Option 4.—The proceeds in whole or in part may be left with the Company at interest until the death of the payee. The Company will pay interest thereon annually, semi-annually, quarterly or monthly, as may be agreed upon, at such rate as the Company may declare each year on such funds, and guarantees that the interest per one thousand dollars of the proceeds shall be not less than \$30 when paid annually, \$14.89 when paid semi-annually, \$7.42 when paid quarterly, or \$2.47 when paid monthly.

Option 5.—The proceeds in whole or in part may be left with the Company at interest and paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the entire proceeds left with the Company, including interest thereon as provided in Option 1, have been paid, provided that the fixed amount payable each year shall be not less than five per cent of the original proceeds left with the Company.

The first instalment under Options 2 and 3 will be payable on the date when the proceeds of the Policy become due, and the instalment payment on each anniversary of the first payment will be increased by such additional interest, in excess of the per cent per annum, as the Company may declare on such funds for that year. The additional interest under Option 2 will be calculated on the unpaid instalments commuted at three per cent per annum, and under Option 3 on the unpaid instalments for the fixed period selected, commuted at three per cent per annum.

When the proceeds of the Policy become payable the Company will deliver to each payee a certificate evidencing the rights and benefits of such payee under the option selected.

At the death of any payee any unpaid sum left with the Company under Options 1, 4 or 5 with accrued interest to date of payment, or the commuted value at three per cent of any unpaid instalments under Option 2, or the commuted value at the per cent of any unpaid instalments for the fixed period selected under Option 3, will be paid in one sum to the executors or administrators of the payee, unless otherwise agreed in writing.

The Insured may direct in writing that the benefits under the above options shall not be transferable nor subject to commutation or incumbrance during the lifetime of the payee.

MONTHLY AND ANNUAL PAYMENTS FOR EACH \$1,000 OF PROCEEDS OF POLICY

Semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment under Option 2, and not less than these respective percentages under Option 3.

OPTION 2			OPTION 3—LIFE INCOME TO PAYEE WITH INCOME GUARANTEED FOR															
Age of Payee When Proceeds Become Payable	Monthly Payment	Annual Payment	Age of Payee When Proceeds Become Payable	8 Years Certain		10 Years Certain		20 Years Certain		Age of Payee When Proceeds Become Payable	8 Years Certain		10 Years Certain		20 Years Certain			
				Monthly Payment	Annual Payment	Monthly Payment	Annual Payment	Monthly Payment	Annual Payment		Monthly Payment	Annual Payment	Monthly Payment	Annual Payment	Monthly Payment	Annual Payment		
10 and under	\$42.86	\$507.39	10	\$3.81	\$44.85	\$3.75	\$44.21	\$3.58	\$42.20	48	\$5.36	\$62.61	\$5.17	\$60.51	\$4.60	\$54.20		
	28.99	343.23	11	3.83	45.07	3.77	44.41	3.59	42.36	49	5.45	63.63	5.24	61.40	4.65	54.71		
	22.06	261.19	12	3.85	45.30	3.79	44.62	3.61	42.54	50	5.54	64.70	5.32	62.33	4.69	55.24		
	17.91	211.99	13	3.87	45.54	3.81	44.84	3.62	42.71	51	5.64	65.83	5.41	63.30	4.74	55.77		
	15.14	179.22	14	3.89	45.78	3.83	45.07	3.64	42.90	52	5.74	67.02	5.49	64.30	4.78	56.30		
	13.16	155.83	15	3.91	46.03	3.85	45.29	3.65	43.08	53	5.85	68.26	5.58	65.35	4.83	56.84		
	11.68	138.30	16	3.94	46.27	3.87	45.53	3.67	43.27	54	5.97	69.57	5.68	66.44	4.87	57.37		
	10.53	124.69	17	3.96	46.52	3.89	45.76	3.69	43.47	55	6.09	70.95	5.78	67.57	4.92	57.90		
	9.61	113.81	18	3.98	46.77	3.91	45.99	3.70	43.66	56	6.22	72.40	5.88	68.75	4.96	58.43		
	8.86	104.92	19	4.00	47.02	3.93	46.23	3.72	43.87	57	6.35	73.93	5.98	69.98	5.00	58.95		
	8.24	97.53	20	4.02	47.28	3.95	46.48	3.74	44.07	58	6.49	75.53	6.09	71.24	5.05	59.46		
	7.71	91.29	21	4.05	47.55	3.97	46.74	3.76	44.29	59	6.64	77.22	6.21	72.55	5.09	59.96		
	7.26	85.94	22	4.07	47.84	4.00	47.01	3.78	44.52	60	6.80	78.99	6.32	73.91	5.13	60.45		
	6.87	81.32	23	4.10	48.14	4.02	47.29	3.80	44.75	61	6.96	80.85	6.44	75.31	5.17	60.92		
	6.53	77.29	24	4.12	48.45	4.05	47.59	3.82	45.00	62	7.13	82.81	6.57	76.75	5.20	61.37		
	6.23	73.74	25	4.15	48.77	4.07	47.90	3.84	45.25	63	7.31	84.87	6.70	78.23	5.24	61.80		
	5.96	70.59	26	4.18	49.12	4.10	48.22	3.86	45.51	64	7.51	87.03	6.83	79.75	5.27	62.20		
	5.73	67.78	27	4.21	49.47	4.13	48.56	3.89	45.79	65	7.71	89.31	6.96	81.30	5.30	62.59		
	5.51	65.25	28	4.25	49.85	4.16	48.91	3.91	46.07	66	7.92	91.69	7.09	82.89	5.33	62.94		
	5.32	62.98	29	4.28	50.24	4.19	49.28	3.94	46.37	67	8.14	94.19	7.23	84.50	5.36	63.27		
	5.15	60.91	30	4.32	50.65	4.23	49.66	3.96	46.67	68	8.37	96.81	7.37	86.14	5.38	63.57		
	4.99	59.04	31	4.35	51.08	4.26	50.07	3.99	46.99	69	8.61	99.56	7.51	87.79	5.40	63.84		
	4.84	57.32	32	4.39	51.53	4.30	50.49	4.02	47.32	70	8.86	102.43	7.65	89.46	5.42	64.08		
	4.71	55.75	33	4.43	52.01	4.33	50.93	4.05	47.66	71	9.13	105.44	7.79	91.12	5.44	64.29		
	4.59	54.30	34	4.48	52.50	4.37	51.39	4.08	48.01	72	9.40	108.57	7.93	92.79	5.45	64.48		
	4.47	52.97	35	4.52	53.02	4.42	51.87	4.11	48.38	73	9.69	111.84	8.07	94.44	5.47	64.64		
	4.37	51.74	36	4.57	53.56	4.46	52.38	4.14	48.75	74	9.99	115.25	8.21	96.06	5.48	64.77		
	4.27	50.59	37	4.62	54.13	4.51	52.90	4.17	49.14	75	10.30	118.78	8.34	97.65	5.48	64.88		
	4.18	49.53	38	4.67	54.73	4.55	53.45	4.21	49.54	76	10.62	122.44	8.47	99.21	5.49	64.97		
			39	4.73	55.36	4.60	54.03	4.24	49.96	77	10.95	126.22	8.59	100.71	5.50	65.05		
			40	4.78	56.02	4.65	54.63	4.28	50.38	78	11.29	130.13	8.71	102.14	5.50	65.11		
			41	4.83	56.71	4.71	55.26	4.32	50.82	79	11.64	134.14	8.82	103.51	5.51	65.15		
			42	4.91	57.43	4.77	55.91	4.35	51.27	80	12.00	138.25	8.92	104.80	5.51	65.19		
			43	4.97	58.19	4.83	56.60	4.39	51.73	81	12.36	142.44	9.02	106.01	5.51	65.21		
			44	5.04	58.99	4.89	57.31	4.43	52.20	82	12.73	146.70	9.11	107.12	5.51	65.23		
			45	5.12	59.83	4.95	58.06	4.48	52.69	83	13.09	151.00	9.19	108.14	5.51	65.24		
			46	5.19	60.71	5.02	58.84	4.52	53.18	84	13.46	155.34	9.26	109.06	5.51	65.25		
			47	5.27	61.64	5.09	59.66	4.56	53.68	85	13.83	159.67	9.32	109.89	5.51	65.25		

and over

LOAN VALUES

After three full years' premiums have been paid and before default in the payment of premium, the Company will advance to the Insured on the sole security of this Policy, as duly evidenced in writing, an amount which interest shall not exceed the Cash Surrender Value. Interest on the loan will be at the rate of six per cent per annum payable annually on the anniversary of the Policy. If interest is not paid when due, it shall be added to the principal. All or any part of the indebtedness may be repaid at any time while the Policy is in force. Failure to repay such indebtedness or to pay interest will not avoid the Policy, but whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the Company shall have mailed notice to the last known address of the Insured and of the assignee of record, if any.

TABLE OF LOAN VALUES FOR EACH \$1,000 OF THE FACE AMOUNT			
Years' Premiums Paid	Loan Value	Years' Premiums Paid	Loan Value
3	\$40	15	\$280
4	55	16	300
5	75	17	321
6	94	18	342
7	115	19	362
8	135	20	383
9	157	21	403
10	179	22	423
11	199	23	444
12	219	24	464
13	239	25	483
14	259		

SURRENDER VALUES

In event of default in payment of premium after three full years' premiums have been paid, the following benefits shall apply:

(a) **Temporary Insurance**—Insurance for the face of the Policy plus any dividend additions and any dividend deposits and less the amount of any indebtedness hereon, shall, upon expiry of the period of grace, be continued automatically as Temporary Insurance as from the date of default for such term as the Cash Surrender Value less any indebtedness hereon will purchase as a net single premium at the attained age of the Insured, according to the American Table of Mortality and interest at 3 per cent. This Temporary Insurance will be without participation in surplus.

(b) **Participating Paid-up Insurance**—Within three months after such default, but not later, the insured may surrender this Policy and elect in place of such Temporary Insurance to have this Policy indorsed for the amount of Participating Paid-up Insurance which the Cash Surrender Value at date of default less any indebtedness hereon, will purchase as a net single premium at the attained age of the Insured at the date of default according to the American Table of Mortality and interest at 3 per cent. The Insured may obtain a loan on such Paid-up Insurance or surrender it within one month after any anniversary for its cash surrender value.

(c) **Cash Surrender Value**—If the Policy shall not have been indorsed for Participating Paid-up Insurance, the Insured, within three months after such default, but not later, may surrender this Policy and all claims thereunder and receive its Cash Surrender Value as at date of default less any indebtedness hereon. The Cash Surrender Value shall be the reserve on the face amount of the Policy at date of default, omitting fractions of a dollar and a thousand of insurance, and the reserve on any outstanding dividend additions and any outstanding dividend deposits, and the surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent of the face of the Policy. The reserve shall be computed on the basis of the American Table of Mortality and interest at 3 per cent.

Cash Surrender Value of Fully Paid Policy—If this Policy shall have become fully paid by its terms, the Insured may surrender the Policy and all claims thereunder within one month after any anniversary of the policy and receive its cash surrender value less any indebtedness hereon. Such cash surrender value shall be computed on the basis described under (c) above.

The values in the "Table of Guaranteed Surrender Values" are computed in accordance with the above provisions, on the basis of \$1,000 of face amount, assuming that premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, that there are no outstanding dividend additions nor dividend deposits, and after deducting the surrender charge, if any.

TABLE OF GUARANTEED SURRENDER VALUES				
After Policy has been in force	Cash Surrender Value for each \$1,000 of the Face Amount	Paid-up Life Insurance for each \$1,000 of the Face Amount	Temporary Insurance from date of default	
			Years	Days
3	\$43	\$86	3	363
4	59	116	5	91
5	80	154	6	290
6	100	188	7	350
7	122	225	9	4
8	144	261	10	31
9	167	297	10	323
10	190	332	11	191
11	211	361	11	340
12	233	390	12	91
13	254	418	12	179
14	275	445	12	232
15	297	471	12	272
16	319	496	12	289
17	341	521	12	282
18	363	545	12	272
19	384	568	12	242
20	406	590	12	202
21	428	611	12	151
22	449	632	12	101
23	471	652	12	31
24	492	671	11	339
25	512	689	11	262
Years				

Ed. June '16. O. L. 1,000. 42.

Values for later years will be computed on the same basis and will be furnished on request.

Any loan under this Policy may be covered by term insurance as follows:

PREMIUMS FOR EACH \$100 OF TERM INSURANCE							
Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year
18	\$0.73	36	\$0.79	41	\$0.98	54	\$1.67
19	0.74	37	0.80	42	0.99	55	1.79
17	0.74	39	0.81	43	1.01	56	1.91
20	0.76	41	0.83	44	1.04	57	2.06
21	0.78	43	0.85	45	1.07	58	2.21
26	0.76	32	0.84	46	1.11	59	2.39
21	0.76	34	0.86	47	1.16	60	2.47
22	0.78	38	0.86	48	1.20	61	2.76
23	0.77	39	0.87	49	1.24	62	3.01
24	0.77	37	0.89	50	1.33	63	3.36
34	0.78	39	0.90	61	1.43	84	3.46
36	0.78	39	0.92	62	1.48		
37	0.79	40	0.94	63	1.67		

For periods of less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a month.

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Indebtedness.—Any indebtedness to the Company against this Policy will be deducted in any settlement thereof.

Self-Destruction.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

The Contract.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application. A copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract; or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City of New York.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity.

NOTE.—NO CHANGE OF BENEFICIARY SHALL TAKE EFFECT UNLESS INDORSED ON THIS POLICY BY THE COMPANY AT THE HOME OFFICE

DATE OF REQUEST	BENEFICIARY	INDORSED BY

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY — Part I

Residence			Place of Business	Present Occupation	Born at
State	County	Town	Street	No.	on <u>15</u> day of <u>November</u>
Name of firm or employer			Former place of business		Former firm or employer

(The address required unless change has taken place within past two years.)

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

Sum to be insured, \$ <u>5000.00</u>	Premiums how payable, <u>Quarterly</u>	Age nearest birthday <u>34</u>
Plan of Insurance <u>Ordinary</u>	with <input type="checkbox"/> without <input checked="" type="checkbox"/> <u>Stability Benefit, 1% Monthly Disability Benefit, Increasing Income Double Indemnity Benefit</u>	Date Policy as of <u>date of this application</u>
Dividend to be <input type="checkbox"/> Paid in cash; <input type="checkbox"/> Applied toward payment of premiums; <input type="checkbox"/> Applied to purchase additional paid-up insurance; <input type="checkbox"/> Applied on the Accelerative Endowment plan.		
I designate as Beneficiary to receive the proceeds of policy in event of death, as I reserve the right to change the Beneficiary by will to time, <u>Cecilia J. Wilson</u>		
Who resides at <u>...</u>		Relationship to me <u>Wife</u>
a The following is all the insurance I now have on my life: <u>10000 from ...</u>		
b The insurance for which I am now applying is not intended to take the place of insurance carried with this or any other Company. If it is, give particulars: <u>...</u>		
Of the insurance on my life the amount which includes benefits in event of total disability is \$ <u>...</u>		
We Company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing from the insurance applied for, except as follows: <u>(If none, say none)</u>		

ADDITIONS OR AMENDMENTS (For Home Office use only)

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant is not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for in Quarters and if so declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Quarters, and 2, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect as if delivered under and subject to the provisions of the policy applied for from and after the time this application is made, whether applied for and received by the applicant or not. 2. That a receipt on the form attached as a coupon to this application for the policy receipt the agent is authorized to give for any payment made before the delivery of the policy. 3. That only the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or alter the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not to be given and knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability. 4. That by signing and accepting said policy, any additions or amendments hereto which the Company may make and refer to in Question 1, titled "Additions or Amendments" are hereby ratified.

Witnessed by <u>...</u>	Agent	Signature of the person applying for insurance <u>Harry Edward Wilson</u>
Name and Residence of <u>...</u>		

NEW YORK LIFE INSURANCE COMPANY

HARRY H. WILSON

No. 10 255 251

Amount \$ 5,000.

QUARTER Annual Premium \$ 48.25

Payable on the 19TH day of MAY

UGUST, NOVEMBER, FEBRUARY

Wm G Woodburn
Pocatello

IDAHO BR.

Notice: It is not necessary for the Insured or the Beneficiary to employ the agency of any person in collecting the insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 Broadway, New York City.

Insurance payable at death.

Premiums payable during life unless dividends applied to shorten premium paying period.

Double Indemnity for fatal accident.

Annual Participation in Surplus.

925-71

Mr. Davis: It is denied in the answer that the premiums were paid on that and that it was in full force and effect. I understand now that counsel will agree that the premiums were paid and that it was in full force and effect at the time of the death of Mr. Wilson.

Mr. Eberle: I stipulate that the premiums were paid and that the defendant paid to the plaintiff the face amount of the policy with the reservation of liability as to the double indemnity only in accordance with the letter to Mr. Davis under date of August 27, 1947, which is marked exhibit "2." The face amount of the policy being \$5000.00 which I think covers the effectiveness of the policy.

The Court: It may be so understood and exhibit "2" will be admitted.

PLAINTIFF'S EXHIBIT No. 2

August 27, 1947.

Mr. B. W. Davis
Attorney at Law
Ross-Davis Building
Pocatello, Idaho

In re: Policy No. 10 255 251 DB No. 623 237
Harry H. Wilson—Deceased

Dear Sir:

We acknowledge the receipt of your letter of August 12 and we have given further consideration to your client's claim for the Double Indemnity Benefit under Policy 10 255 251.

The policy provides that:

"The Double Indemnity Benefit shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury."

It is the Company's position that it has not received the "due proof" required by the paragraph of the policy which is first quoted above. From the information received by the Company and the papers submitted by and on behalf of the beneficiary in support of her claim, it does not appear that the insured's death is within the coverage of the Double Indemnity Provision of the above policy. On the contrary, such information and papers indicate that the insured's death was caused directly or indirectly from infirmity of body or from illness or disease and did not result directly and independently of all other causes from bodily injury.

effected solely through external, violent and accidental means.

Therefore, we regret that it is necessary to advise you that the amount of the single indemnity proceeds already paid the beneficiary represents the Company's entire liability under Policy No. 10 255 251 and that the Company denies liability for the Double Indemnity Benefit.

Very truly yours,

Chairman, Committee on
Death Benefits.

HJL/h

Mr. Eberle: May it be stipulated that the proof offered in the other case just finished, that is, [3] The Business Mens Assurance Company case, by Doctor Call, Doctor Brothers and Doctor Graves, and exhibit numbered "7" in that case, and the deposition which was a part of the cross-examination of Doctor Call, and the depositions of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart may be copied into the record as evidence in this case.

The Court: The record may be made just the same as if the witnesses were on the stand in this case. I understand that the only exhibits we have in this case is exhibit 1, which I think is the policy and the letter exhibit 2 and the hospital chart or record and the deposition of Doctor Call.

Mr. Eberle: I understand the exhibits will be numbered 1, 2, 7 and 8.

The Court: Should there be copies for the rec-

ord in this case. Also they will be renumbered here. Doctor Call's deposition will be number 3 and the hospital record will be number 4. There being no objection they may be admitted.

PLAINTIFF'S EXHIBIT No. 3

In the District Court of the United States for the
District of Idaho—Eastern Division

Civil Action No. 1462

CECILIA J. WILSON,

Plaintiff,

vs.

BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA, a Corporation,

Defendant.

Civil Action No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation of New York,

Defendant.

The deposition of Doctor O. F. Call, of Pocatello, Idaho, was taken before me, R. D. Bistline, a Deputy Clerk of the above-entitled Court on the 17th day of February, 1948, at the office of said Doctor O. F. Call, in the Kasiska Building, Pocatello, Idaho, pursuant to stipulation of counsel for the

Plaintiff's Exhibit No. 3—(Continued)

respective parties to this action, on behalf of the respective defendants in the above-entitled actions.

B. W. Davis of Pocatello, Idaho, appeared as attorney for the plaintiff in each case, and J. L. Eberle of Boise, Idaho, appeared as attorney for the defendant Business Men's Assurance Company of America, a corporation; and A. L. Merrill, of Pocatello, Idaho, appeared as attorney for the defendant New York Life Insurance Company, a corporation of New York.

DR. O. F. CALL,

being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

Direct Examination

By Mr. Eberle:

Q. Doctor, will you state your name, please?

A. O. F. Call.

Q. And you are licensed to practice medicine in Idaho? A. Yes, sir.

Q. And how long have you been so practicing?

A. Since 1921.

Q. Do you know the plaintiff, Cecelia J. Wilson?

A. I do.

Q. And is she the widow of Harry Wilson?

A. She is.

Q. Were you Mr. Wilson's doctor?

A. I was.

Q. Over what period of time were you his doctor, or medical attendant?

Plaintiff's Exhibit No. 3—(Continued)

A. Oh, I have been the family attendant for a period of fifteen years,—around fifteen years.

Q. Now, can you give us briefly the medical history of Mr. Wilson during those fifteen years, giving it to us chronologically?

A. Well, it goes something like this: Like all people, Mr. Wilson had the ordinary colds, grips, periodically, as most of us do, and about,—this is just a guess right now, about ten years ago, or seven years ago,—between seven and ten years ago, he had a bowel obstruction for which I operated him. I don't recall the exact year of that,—it was 1940, about eight years ago,—from which he made a recovery with the result of an incisional wound, incisional rupture, hernia,—what we call a ventral hernia, for which he was operated for repair work about four years ago in the Mayo Clinic. Now, he was also operated at that time for an inguinal hernia. And then he returned home here and I became his attendant again, treating him for occasional colds, and a mild rise in his blood pressure, which I watched, along with him, for the last four or five years. Then the last work I did for Mr. Wilson was in April, 1947, at which time I took him to the hospital to repair this recurring inguinal hernia.

Q. Let's go back to the time of the hernia operation at the Mayo Clinic, was that in 1944?

A. 1943, I have it here in my notes.

Q. In 1943. And had he come to you first before he went to Mayo's?

Plaintiff's Exhibit No. 3—(Continued)

A. Oh, yes. I advised him to go and have those people do that.

Q. Now in 1947 then, you started to say something about taking him to the hospital?

A. In 1947 he had a recurrence of the inguinal hernia and from 1943,—he came back soon after he left the Clinic, and they had a truss on him, an abdominal truss with a pad over the hernia, which he wore until the sixth of April, 1947, on which day we operated on him for repair of that inguinal hernia.

Q. When did you take him to the hospital? What day?

A. He entered on the sixth of April,—4-6-47 is correct,—and he was prepared for an operation, and on the seventh of April he was operated for a right inguinal hernia.

Q. It was on the seventh? A. Yes.

Q. Now, Doctor, you made an examination before the operation, did you? A. Oh, yes.

Q. And that was on the sixth, was it?

A. Well, yes, on the sixth.

Q. On the sixth of April, 1947?

A. That is right.

Q. At that time was he well nourished?

A. Yes; he was well nourished.

Q. Was he overweight? A. No.

Q. What was his age?

A. His age was sixty-one, as I have it recorded here.

Q. Sixty-one. And have you his weight at that time?

Plaintiff's Exhibit No. 3—(Continued)

A. I doubt very much if I have. They are usually weighed at the hospital but I don't have it in the record, his weight in the hospital.

Q. Have you got his height?

A. I haven't got it,—yes. No; I haven't either; that is his blood pressure.

Q. Do you know what his height was, Doctor?

A. About five foot eight,—about that.

Q. And do you know about what his weight was? A. About one hundred and sixty.

Q. One hundred and sixty. Now, was his blood count normal at that time, on April sixth?

A. Yes; it was. I can give it to you, if you want it.

Q. All right, read it into the record.

A. His blood count was 4,300,000 red corpuscles, and 7,500 white, with a hemoglobin content of 15.2. And I have here the urine examination of the same date.

Q. Yes; will you give us the results of the urine examination, Doctor?

A. On the urine examination he had a specific gravity of 10.20, which is normal, and amber color; acid in reaction; no albumen; no sugar; no pus cells; no blood cells and no epithelial cells; no casts; no crystals. In other words, a normal urine.

Q. And, Doctor, was his heart normal?

A. Yes; his heart was normal, with a rate of seventy-two per minute, the morning he went to surgery.

Q. Do you know whether there had been any

Plaintiff's Exhibit No. 3—(Continued)

pre-existing cardiac disease?

A. I don't have any record of any, or any note of any pre-existing cardiac disease over the period I have taken care of him. I do have a record of an occasional raise in his blood pressure. You would hardly call that a cardiac disease; that is vascular,—a vascular disease. That isn't cardiac.

Q. Was there any evidence of varicose veins?

A. I think not. Let me look at the examination and I will tell you for sure,—there was no notation of any varicose veins.

Q. Was there any swelling in his legs or feet?

A. No.

Q. And you didn't observe any varicose veins in his legs?

A. I have no record of any varicose veins.

Q. Was his blood pressure within normal limits for his age?

A. Slightly above. He was aged sixty-one, and his blood pressure was one hundred and sixty over eighty-six, which means one hundred and sixty diastolic and eighty-six systolic.

Q. And at the time,—and I am speaking now of April sixth before the operation?

A. That is what I understood.

Q. Was there, Doctor, more than the usual arteriosclerosis for a man of his age?

A. No.

Q. Did he have a cold?

A. He did not. We don't operate when they have colds.

Plaintiff's Exhibit No. 3—(Continued)

Q. Well, I am just asking you. When did he arrange with you for this operation?

A. We talked about this operation for several months. We didn't make the actual arrangements until the day before,—the exact time.

Q. And excepting as you have mentioned, his cardio-vascular system was within normal limits?

A. That is right.

Q. Now, was there any unusual incident that occurred during the operation?

A. No; it was very smooth.

Q. And skillfully performed?

A. Yes; skillfully performed, if I do say so myself.

Q. Was there any autopsy? A. No.

Q. Now, Doctor, have you the hospital records?

A. Yes; I have them right here.

Mr. Eberle: I will have this marked as Defendants' Exhibit "A."

(Whereupon document referred to was marked Defendants' Exhibit "A" by the Reporter.)

Q. (Mr. Eberle, continuing): Doctor, handing you Defendants' Exhibit "A," I will ask you if this is the hospital record of Mr. Wilson?

A. This is. That is right.

Q. It is the original record of which hospital?

A. Of the St. Anthony's Hospital, Pocatello.

Q. Of the St. Anthony's Mercy Hospital at Pocatello, Idaho? A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)

Q. And is it a complete record,—is it the complete record of the hospital?

A. Yes; of the hospital, it is.

Mr. Eberle: Now, Mr. Davis, I would like to offer this in evidence, and in the order that the hospital may have the original record returned, may it be agreed a photostatic copy may be substituted, and marked Exhibit "A"?

Mr. Davis: That is agreeable.

Mr. Eberle: And that the copy may serve the same purpose as the original?

Mr. Davis: Yes. Now, I make no objection as to the identification, and, of course, while the right is reserved in the stipulation, I want it understood, Mr. Eberle, that I am reserving the right here to object to that as to its materiality or its competency, if in examining it it appears that it isn't competent or material. I haven't examined it. Doctor Call just brought it over so it could be available here.

Q. (Mr. Eberle, continuing): Have you any office records, Doctor?

A. Not of this. I have office records over the past years.

Q. Now, Doctor, can you tell us at what hour on April sixth Mr. Wilson went into the hospital?

A. Into the hospital at seven ten p.m.

Q. On April sixth?

A. On April sixth.

Q. And when did you operate on April seventh?

A. I operated on April seventh,—the hour isn't

Plaintiff's Exhibit No. 3—(Continued)

given, but it would be at eight or nine o'clock in the morning.

Q. At either eight or nine o'clock on the morning of the seventh? A. Yes, sir.

Q. And at what time did death occur?

A. Death occurred at five o'clock in the morning of April eighth.

Q. At five o'clock a.m. on April the eighth. Have you those records of previous attendance on Mr. Wilson, Doctor Call? A. Yes; I have.

Q. I wonder if we could see them?

A. Is it important you have the hour he was operated?

Mr. Merrill: Yes; if you have it.

Q. (Mr. Eberle, continuing): You said it was around eight or nine o'clock in the morning, didn't you, Doctor?

A. It would be either eight or nine, and I can't see here where the hour of the operation was given. The hour isn't given. As a rule it is there, but it is not there.

Q. That is your best recollection?

A. I know it was at either eight o'clock or nine o'clock. That is one thing I do know. It is one thing I know is true. I know, for the reason that surgery is always done at one of those two hours, whenever possible.

Q. Doctor, going back to the operation that you performed on Mr. Wilson, for the intestinal obstruction, was it?

A. Yes; for an intestinal obstruction.

Plaintiff's Exhibit No. 3—(Continued)

Q. In 1940?

A. He developed an infection in his wound, and that was followed by a hernia of the wound.

Q. Of the wound, you say,—you mean the incision in connection with the intestinal obstruction operation?

A. Yes.

Q. The wound of this operation would not heal; is that correct?

A. It healed, but it left a hernia. There are five layers in the abdominal wound. Four of them gave way and left the skin over it, and that is what you call the hernia.

Q. Did you operate on that what you call a “ventral” hernia?

A. No; that is the one he went to Mayo's for.

Q. He went to Mayo's for that operation?

A. Yes, sir.

Q. And he was also operated on at Mayo's for the inguinal hernia?

A. Yes.

Q. And then he came back to Idaho, and in 1947 you operated on him for the inguinal hernia at that time?

A. That is right.

Mr. Eberle: I think that is all I have. Have you any questions, Mr. Davis?

Mr. Davis: No; I don't care to ask him any questions.

Mr. Eberle: I think that is all then, Doctor.

(Reporter's Note: Signing of the deposition by deponent was waived by stipulation of counsel hereto annexed. R.D.B.)

Plaintiff's Exhibit No. 3—(Continued)

CERTIFICATE OF OFFICER

United States of America,
State of Idaho, County of Bannock—ss.

I, R. D. Bistline, the duly appointed, qualified and acting Deputy Clerk of the District Court of the United States, for the District of Idaho, Do Hereby Certify That Doctor O. F. Call was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that the above and foregoing deposition by him was recorded stenographically by me and later by me reduced to long-hand typewriting;

I Further Certify That the signing of said deposition by the witness was waived by stipulation of respective counsel, which stipulation is hereto annexed; and that said deposition constitutes a true record of the testimony given by said witness.

I Further Certify That the said deposition was taken by me at the time and place hereinbefore specified and that the taking of said deposition commenced on the 17th day of February, 1948, at the hour of one-thirty o'clock p.m., and was completed the same day.

I Further Certify That B. W. Davis, of Pocatello, Idaho, appeared as attorney for the plaintiff, and J. L. Eberle of Boise, Idaho, appeared for the defendant Business Men's Assurance Company of America, a corporation, and that A. L. Merrill, of Pocatello, Idaho, appeared as attorney for the defendant New York Life Insurance

Plaintiff's Exhibit No. 3—(Continued)

Company, a corporation of New York, and that each of said attorneys was present during the entire examination.

I Further Certify That I am not an attorney or counsel of either of the parties to this action, or a relative or employee of any attorney or counsel connected with the actions, and am not financially interested in the action.

In Witness Whereof, I have set my hand, and affixed the seal of said United States District Court for Idaho this 21st day of February, A.D. 1948.

[Seal]

ED. M. BRYAN,
Clerk, U. S. District Court.

By
Deputy.

DR. O. F. CALL,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [4]

Q. Doctor, will you state your name?

A. O. F. Call.

Q. Where do you reside?

A. Pocatello, Idaho.

Q. What profession do you follow?

A. Physician and surgeon.

Q. What college or school did you attend?

A. Jefferson Medical College, Philadelphia.

Q. Are you a member of any medical society?

(Testimony of Dr. O. F. Call.)

A. Yes, sir.

The Court: I wonder if counsel can't admit this man's qualifications. I know I will take judicial notice of his qualifications.

Mr. Davis: I did think to show the amount of practice.

The Court: Certainly you may do so.

Mr. Davis: No, when the Court makes a suggestion I will not go against that.

Q. I will simply ask how long you have practiced, Doctor? A. Since 1920.

Q. Have you done any post graduate work?

A. Yes, sir.

Q. When?

A. In 1926 one winter in New York studying surgery, and an entire year in 1930 in the University of Pennsylvania post-graduate surgery. [5]

Q. You have attended in the past, or gone to Mayo's clinic to study their technique?

A. Yes, frequently, about every other year.

Q. Doctor, you knew Mr. Wilson; Harry Wilson, deceased? A. Yes, sir.

Q. How long had you known him?

A. About twenty years.

Q. You had been his physician?

A. Yes, sir.

Q. How long had you been his physician?

A. All of that time.

Q. Doctor, prior to this operation you performed what was Mr. Wilson's general condition?

A. He had ordinary good health of the average

(Testimony of Dr. O. F. Call.)

man with the exception that he had had an operation about four years ago at the Mayo Clinic, that is, four years before this last operation. He had ordinary colds the same as the average man and a little difficulty with hypertension—high blood pressure.

Q. What was this operation on April 7 for?

A. Recurrent inguinal hernia.

Q. What was his general condition when he went into the hospital? A. Very good.

Q. That is before this last operation?

A. Yes, it was very good. [6]

Q. When was this operation performed?

A. April 7, I think it was eight in the morning.

Q. A regular chart was kept, a regular hospital chart written by the nurse was kept in this case?

A. That is right.

Q. Is it ordinary and customary for a nurse to report on the chart the fact that the patient snores?

A. Not ordinary.

Q. Is there a report on the chart here of continuous and loud and violent snoring by this patient?

A. Yes, sir, there is, the nurse made several reports of loud continuous snoring, more than she had heard in other cases and she was assured—

Q. What was that, Doctor?

A. She was assured that was a common thing with Mr. Wilson, that he always snored.

Q. What was the nature of Mr. Wilson's snoring in the hospital prior to his passing?

(Testimony of Dr. O. F. Call.)

Mr. Merrill: Are you referring now to his personal knowledge?

Q. Personal knowledge, Doctor, do you have personal knowledge of it?

A. Yes, I was there and heard him snoring.

Q. Was it violent and almost a spasm would you say?

A. Sometimes you would think that he would shut off his breath and then he would catch his breath with a jerk. [7]

Q. And would the patient jerk or move?

A. Yes, sir, he would rather jerk.

Q. Did he have an accumulation of phlegm or coughing spells?

A. No, I wouldn't say,—well, after snoring he would have a slight cough like that (indicating)

Q. Do you have the chart with you, Doctor?

A. I think it is in the Court room.

Mr. Davis: We offer in evidence exhibit marked exhibit "7," the original chart from the hospital and counsel for the defendant has taken photographic copies of this instrument and we would like to have it understood that a photographic copy may be used if the matter should remain in Court any considerable time so that the original could be returned.

The Court: It may be introduced subject to withdrawal.

Q. Now, Doctor, I call your attention to the—

The Court: —You understand that the photo

(Testimony of Dr. O. F. Call.)

static copy may be used in lieu of this original after the trial of this case.

Mr. Davis: Yes, that was my understanding. This is plaintiff's exhibit "7."

Q. I call your attention to the nurse's bedside chart or bedside notes, and to the fact that it refers twice to [8] the fact that he was coughing, and that something was given for the cough. If the record shows that, it would indicate that he was coughing. A. Certainly.

Q. How many operations for hernia have you performed during your practice?

A. I have been doing them for twenty odd years, I would say four or five hundred.

Q. Out of that four or five hundred how many post-operative deaths have occurred in your operations for hernia?

A. This one case only.

Q. Did you give this case the same general care and attention that you gave the others?

A. Yes, sir.

Q. The same attention you gave all of them?

A. Yes, sir.

Q. Doctor Call, can you or would you say that post-operative death from hernia is a very rare occurrence? A. Yes, it is.

Q. What do you base that statement upon?

A. I base that upon my own experience that I have mentioned and the various clinics around the country; the statistics that we have gathered.

Q. In the case of Mr. Wilson was there anything

(Testimony of Dr. O. F. Call.)

that could have been reasonably anticipated, or was there any reason [9] for you to expect a post-operative death? A. No.

Q. Or death by pulmonary embolism?

A. No reason that I could expect in relation to the operation.

Q. If there had been any reason for you to expect that would you have operated?

A. No.

Q. Generally in the medical profession and following the usual standards, if there is anything to indicate, or the percentage of cases show that there is a likelihood of death or that you could anticipate death would you operate?

A. I don't think that there is a surgeon in the country that would operate if he thought the man was going to die.

Q. What was the cause, in your opinion, of Mr. Wilson's death?

A. Acute pulmonary embolism.

Q. What is pulmonary embolism?

A. An embolism is a foreign substance or piece of a clot flowing in the blood stream which goes through the heart; through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance.

Q. It doesn't follow that it is a clot of blood?

A. Not necessarily. [10]

Q. Was this pulmonary embolism caused by and a result of the hernia operation?

(Testimony of Dr. O. F. Call.)

A. I don't think it would be anything per se connected with the operation.

Q. I call your attention to the deposition of Doctor Beeman,—have you read the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart?

A. Yes, sir.

Q. Which were taken in this case?

A. Yes, sir.

Q. Now, I call your attention to the following answer by Doctor Beeman on page eight of the deposition where he was being questioned about this case and why there would be a pulmonary embolism and death, wherein he said: "For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time." Now, Doctor, that was referring to a prior operation?

A. Yes, sir.

Q. Continuing, "and the hernia operation of April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and for a pulmonary embolism." Assuming that Doctor Beeman was correct in that premise and that a thrombus had been formed, it would not necessarily follow that even if there was a thrombus that it caused [11] this particular embolism?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is not just clear to me, your question.

Q. Yes,—now assuming that Doctor Beeman is correct and that a thrombus may have occurred or formed previously and that it may have been the

(Testimony of Dr. O. F. Call.)

exciting factor, as he says, in the pulmonary embolism, now, there may be other things that would have been the exciting factor too?

A. Yes, sir.

Q. The violent snoring that the man did, and the choking and the violent coughing may have been the exciting factor?

A. Yes, sir.

Q. And could have been.

A. Yes, sir.

Q. And in your opinion, Doctor, was that the cause?

Mr. Merrill: Objected to as leading.

The Court: It is somewhat leading, he may answer however. It is a matter the Court has control of.

A. That is my opinion.

Q. Now, Doctor, I call your attention, have you looked at and studied and been given the definition of accident as defined in Webster's International Dictionary?

A. Yes, sir. [12]

Q. In your opinion was the death of Mr. Wilson due to accident?

A. Yes, sir.

Q. Are you familiar with and have you studied and read this book written by TeLinde,—Richard W. TeLinde?

A. Yes, sir.

Q. This was published in 1947.

A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement in there on page 87 in which he says: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." You have read that?

A. Yes, sir.

Q. Do you agree with that?

A. I do.

Q. And I call your attention to another statement

(Testimony of Dr. O. F. Call.)

on the same page where he is also discussing pulmonary embolism and where he says that occasionally there is something else causing the plugging of the pulmonary circulation which causes death, such as bronchial obstruction and so on,—do you agree with that? A. That is a well-recognized fact.

Q. Coughing and violent snoring might cause the breaking loose of a clot or foreign substance that caused the pulmonary embolism.

A. Yes, sir. [13]

Q. And is it your opinion in this case that is what did cause it? A. Yes, sir, that is right.

Q. I call your attention to the deposition of Doctor Beeman and that reference is made to the fact that pulmonary embolism may come from immobilization. If as stated by Doctor Beeman there had been a thrombus,—if this man had a thrombus,—Doctor, what is the treatment for Thrombus?

A. Rest and quiet.

Q. Mobilization would be absolutely the wrong treatment. A. Yes, sir.

Q. That is, if the man had a thrombus?

A. Yes, sir.

Q. Was this man treated the same as other patients following a hernia operation?

A. Yes, sir, the standard form of treatment?

Q. I call your attention to a question asked of Doctor Swindell on page 13 of the deposition the question is: “Is there any substantial difference in the symptomatology of a pulmonary embolism and a

(Testimony of Dr. O. F. Call.)

thrombus." And the answer is: "No." What is your answer to that, Doctor?

A. A decided difference.

Q. What is the difference between a Thrombus and embolism?

A. A thrombus is a large, or any clot filling a vessel, and an embolism is a little particle of that clot floating. [14] The symptoms of the thrombus would be swelling of the part involved, and interference with the circulation,—a pain in that area, and the symptoms of pulmonary embolism is an acute tragic pain in the chest.

Mr. Eberle: If you are going to continue with this form of examination I will have to object, it is not proper to compare the testimony of one witness with that of another. It is not proper to ask this witness if he agrees with the testimony of another witness.

The Court: The question has been answered, there is nothing before the Court now.

Q. Doctor Call, I am referring now to page 15, in the testimony of Doctor Swindell: "Would the same be true of immobilization as incident to surgical procedure"? The answer: "Yes, immobilization predisposes to the formation of thrombi and emboli." Now, Doctor, does immobilization predispose to the formation of Thrombi?

A. Yes, sir.

Q. What is the difference between thrombus and thrombi?

A. Thrombi is the plural of thrombus.

(Testimony of Dr. O. F. Call.)

Q. I thought immobilization was the treatment for thrombosis?

A. That is right, I misunderstood you, I thought you were talking about embolism.

Q. Now, here is the question, Doctor. "Would the same be true of immobilization as incident to surgical procedure?" [15] And the answer: "Yes, immobilization predisposes to the formation of thrombi and emboli." Does immobilization predispose to the formation of Thrombi? A. No.

Q. Was there any indication that Mr. Wilson was suffering—strike that please,—At the time of Mr. Wilson's death is there any indication that there was a condition of profound shock?

A. No, sir.

Q. Why do you say that?

A. Because of the symptoms present. Profound shock means rapid pulse, rapid feeble pulse, weak heart beat; a person in a general exhausted condition.

Q. Referring to exhibit 7, Doctor, which is the hospital record and the chart, do you recall what the man's pulse was at the time of passing away?

A. About seventy-two, it never went above eighty.

Q. Did it ever go above 72, had it ever gone above seventy-two according to that?

A. I think there is one place recorded that it was between 72 and 80.

Q. There isn't anything to indicate that the person was suffering from shock at all.

A. There is not.

(Testimony of Dr. O. F. Call.)

Q. Have you, in addition to your general knowledge, within [16] the last forty-eight hours, made a study to refresh your memory and to keep you advised, or to fully advise you as to the percentage of post operative deaths from pulmonary embolism in all kinds of abdominal surgery, not hernia but all abdominal surgery? A. Yes, I have.

Q. What does the book of TeLinde, which I have referred to here, show the percentage of all operations to be at Mayo's Clinic?

A. Eight per cent I think it is?

A. No, it is five and eight-tenths per cent.

Mr. Merrill: I object to counsel testifying here.

Mr. Davis: May I show the book to the Doctor?

The Court: Yes, you may.

A. That is correct, five and eight-tenths per cent.

Q. Is the hernia operation such as you performed an abdominal or pelvic operation?

A. It is not.

Q. What is an abdominal operation?

A. You open the abdominal cavity.

Q. And what is a pelvic operation?

A. Where you open the pelvic cavity.

Q. What are the kinds of operation in which there is most danger of post-operative deaths and most pulmonary embolism?

A. It is most common in female pelvic operation and in male prostate operations, and in operation in reference to the Billeni's system,—of fractures.

Q. What about the operations in reference to hernia? A. Scarcely mentioned.

(Testimony of Dr. O. F. Call.)

Q. It is very rare, is that right?

A. It is very rare.

Q. Doctor Call, taking your own experience, in all operations you have performed over the period of years you have practiced would it exceed a thousand?

A. Yes, it is more than that, I would say several thousand.

Q. How many post operative deaths from pulmonary embolism in all of those operations have you had?

A. I can off-hand think of three.

Q. Including this one? A. Yes, sir.

Q. You have been and are Mrs. Wilson's physician? A. Yes, sir.

Q. What was Mrs. Wilson's general condition in June and say up to the 15th of July of this year?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: It may be admitted, he may answer, this is subject to your objection. If on going into this matter the Court decides it is not material, then it will be stricken. I think you said July of this year.

Mr. Davis: Of course, I meant July of last year.

A. Her health was very poor. [18]

Q. Was it possible for you as her Doctor or myself as her counsel, during the fore part of July or the last part of June to talk to her about matters in connection with her husband's death, or to transact any business with her in reference to her estate?

A. Such procedure would be very harmful to Mrs. Wilson.

(Testimony of Dr. O. F. Call.)

Q. And it was your opinion that it should not be done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer subject to your objection.

A. That is right.

Q. And that she should be left alone?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That's right.

Q. What are the cardinal symptoms of pulmonary occlusion?

A. Occlusion means stopping.

Q. Would it be accompanied by pain?

A. Yes, it would be accompanied by quite severe pain.

Q. There is nothing to indicate that this man had coronary thrombosis or pulmonary occlusion.

Mr. Merrill: Objected to as leading.

The Court: It is leading but he may answer. [19]

Mr. Davis: I will withdraw the question, it is not of any particular help. I think that is all, you may cross-examine.

Cross-Examination

By Mr. Eberle:

Q. Did you give your deposition in this matter some time ago? A. Yes, sir.

Mr. Eberle: May I have the deposition published?

The Court: It may be published. I think before

(Testimony of Dr. O. F. Call.)

you start this examination we will take a ten-minute recess.

11:05 a.m., March 17, 1948

Mr. Davis: I would like to clear up one matter if I may before they take the witness.

The Court: Very well.

Q. Doctor Call, in asking my questions I asked you to give the cardinal symptoms of pulmonary occlusion, I used the word pulmonary instead of coronary. I meant coronary occlusion?

A. The symptoms are; intense agonizing pain, probably the most intense known to the human body; profound sweating, and one can hardly get his breath.

Q. Doctor, going back to post-operative death. What is your opinion from your own experience and based upon the study you have made of the authorities. Where death is due [20] to surgery,—due to pulmonary embolism and where pulmonary embolism is due to surgery, does that follow immediately or within twenty hours or is it more likely to follow later?

A. It is more likely to follow from thirteen to twenty-one days later.

Q. Thirteen to twenty-one days later?

A. That's right.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Eberle:

Q. Doctor Call, handing you exhibit 8 I will ask you if that is the deposition you gave recently in this

(Testimony of Dr. O. F. Call.)

case, and is exhibit "A" attached thereto a part of it?

A. Yes, sir, it is, that is correct.

Mr. Eberle: I offer it in evidence as a part of the cross-examination of this witness.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Exhibit "A" and exhibit "8" Doctor Call, exhibit "A" is that a photostatic copy of the hospital record?

Mr. Davis: Unless the Doctor knows I will object. If he may have an opportunity to check it with the original.

The Court: Yes, certainly, when it is checked [21] it may be substituted if that is your desire.

Q. When did you last see Mr. Wilson?

A. You mean at the hospital.

Q. When did you last see Mr. Wilson on April 8?

A. I saw him just a few minutes after his death, that is the last I saw him.

Q. Someone there at the hospital called you?

A. Yes, sir.

Q. About what time in the morning of April 8 did they call you, from the hospital?

A. About 4:30.

Q. In the morning. A. Yes, sir.

Q. Mr. Wilson had died before you arrived?

A. I immediately dressed and went over, as I got there he was expiring.

Q. It took you about a half hour to get there?

A. I was in bed when they called.

(Testimony of Dr. O. F. Call.)

Q. Prior to that when was the last time you had seen Mr. Wilson?

A. Eleven o'clock in the evening.

Q. The evening of the seventh?

A. Yes, sir.

Q. And is your diagnosis of his death as a result of pulmonary embolism based upon the hospital record? [22]

A. Based upon personal analysis of the case.

Q. At eleven o'clock when you last saw him did he show any indication of the terminal period?

A. No, sir.

Q. At eleven o'clock when you saw him there was no symptomology of acute heart failure?

A. That's right.

Q. When you saw him in the morning he was just about expired?

A. Yes, sir.

Q. And on that,—that is what you based your diagnosis on?

A. It would have to be on that and on the record.

Q. Is it difficult to diagnose death of pulmonary embolism as distinguished from acute heart failure?

A. I don't think so. I might say this: If you want to be absolutely certain,—if you want absolute proof you would have to have a post mortem.

Q. You cannot be absolutely sure without a post mortem.

A. You have the record and all these circumstances,——

Q. ——But Doctor, when you arrived at the time

(Testimony of Dr. O. F. Call.)

of death, when you arrived at the hospital what did you find to base your diagnosis on?

A. The record of the nurse.

Q. What else?

A. He was expiring suddenly.

Q. Those two things are the only basis for your diagnosis. [23]

A. That's right.

Q. How many times did you see Mr. Wilson between the time of the operation at eight or nine in the morning of the 7th and eleven o'clock that night?

A. I cannot tell you the exact number of times, I was in and out of the room several times.

Q. You operated between eight and nine?

A. Yes, sir.

Q. And you went in again shortly after the operation?

A. Shortly after nine I would say.

Q. He was under the anesthetic?

A. He had a spinal and he was not asleep.

Q. When did you see him again?

A. In ten or fifteen minutes, I was there all morning taking care of hospital work. I saw him several times.

Q. Several times before noon would you say?

A. Yes.

Q. In the afternoon when did you see him?

A. About four-thirty.

Q. When did you see him again?

A. I dropped in again around nine o'clock.

Q. About nine and then again about eleven that evening.

A. That's right.

(Testimony of Dr. O. F. Call.)

Q. In your opinion repair of this hernia was necessary?

A. It was very advisable. The man could live without it but it was very advisable. [24]

Q. You wouldn't operate unless it was necessary?

A. To the reconstruction of good health it was necessary.

Q. The surgery you performed was in the method usually followed by skilled surgeons?

A. That's right.

Q. Now then, Doctor, before you left at noon was there any snoring?

A. As he would drop off to sleep under the opiate.

Q. Under the opiate? A. Yes.

Q. He was snoring?

A. Of course, at times he was not asleep.

Q. If he was asleep he was snoring?

A. Yes, sir.

Q. How often was he snoring?

A. I didn't keep track of that. I know I would talk to him and he would joke with me but when he went to sleep he would be snoring.

Q. At nine o'clock he was snoring.

A. At nine o'clock he was joking about a bridge game part of the time.

Q. At eleven o'clock he was snoring.

A. Part of the time, yes.

Q. When did he start to cough?

A. During the night. [25]

Q. Was he coughing at nine o'clock?

A. Between nine and eleven.

(Testimony of Dr. O. F. Call.)

Q. You saw him about nine and again about eleven. A. Yes.

Q. You wouldn't know except by the hospital record that he was coughing between nine and eleven.

A. That is the only way I would know, I wasn't there to hear it.

Q. I think you said that embolism was not the result of the operation?

A. I don't think it had anything to do with the operation per se.

Q. What do you mean "per se"?

A. Per se is a direct connection. It would mean that the operation would have no direct connection, not the direct cause of death. It means, in and of itself.

Q. In other words, it may have been the cause, but not in and of itself.

A. Not in and of itself.

Q. It may have been the cause.

A. It could have been the exciting cause.

Q. It could have contributed to the embolism.

A. Yes.

Q. If this would have happened without the operation it is your opinion that Mr. Wilson would have died,—without [26] the operation?

A. He might have been going down the street; he might have been coughing or snoring, he might have fallen.

Q. And of course, he would have died.

A. Yes, sir, he could have.

7 Q. And he might have died at home, in bed.

(Testimony of Dr. O. F. Call.)

A. Absolutely.

Q. If the embolism was not caused by the operation, what in your opinion was it caused by?

A. Extreme coughing and snoring is enough to break loose a part of a thrombus and make the embolism.

Q. Was the coughing and snoring incident to the operation?

A. Partly connected with the operation. The sedative made him snore more than he would at other times.

Q. What pre-operative medication did you give?

A. I gave opiates and barbitrates.

Q. That would wear off in how long?

A. In about six hours.

Q. What did you give after that?

A. Opiates.

Q. Is that usual in operations of this type?

A. Yes, sir.

Q. And the opiates putting him to sleep made him snore.

A. Yes, sir.

Q. Did you know that he snored? [27]

A. Yes, I did.

Q. You knew that was a hazard?

A. I knew that he always snored when he slept.

Q. Doctor, what did that cough come from?

A. As he snored a little phlegm would get in his throat, it would collect and drop in his throat, causing him to cough.

Q. Coughing as you suggested could have caused the embolism, could a heart condition—

(Testimony of Dr. O. F. Call.)

A. He didn't have a heart condition.

Q. Atelectasis of the lungs?

A. He didn't have atelectasis.

Q. Could it have come from immobilization?

A. Hardly.

Q. What could it have come from?

A. From the phlegm that came during his sleep and caused the coughing.

Q. What other possible causes?

A. The possible causes are numerous, he could have had metastatic congestion.

Q. Post operative congestion? A. Yes.

Q. If that was the case, it would be due to the operation?

A. Yes, if he had that it would; I don't say he did have.

Q. What else could it have been? [28]

A. The man could have had a cough, a cold.

Q. Ether pneumonia.

A. But he didn't have ether. You were asking for the possibilities.

Q. Do you think, Doctor, that the snoring was sufficient to cause a breaking of a thrombus?

A. His snoring was so severe, well, he would hold his breath and then he would jerk when he would take in his breath he would draw this phlegm into his throat.

Q. Doctor, where would this break loose,—this thrombus?

A. Wherever the embolism was formed.

Q. Where was this embolism?

(Testimony of Dr. O. F. Call.)

A. In the veins of the pelvis, was likely leading from the pelvis circultaion.

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people.

Q. You think it could have broken loose after four years? A. It is entirely possible.

Q. Was it possible to arise in the calf of his leg?

A. He didn't have anything in the calf.

Q. Where do they arise generally?

A. In a branch of the Illiac veins.

Q. Counsel questioned you quite a little about immobilization, do I understand you are of the opinion that immobilization [29] cannot or could not cause pulmonary embolism?

A. Immobilization does not cause embolism. Mobilization causes embolism.

Q. Why do people have phlebitis?

A. That is not embolism.

Q. What was that, Doctor?

A. That is not embolism, you are thinking of thrombosis of the vein.

Q. The difference between thrombosis and embolism is one stays in the vein and the other floats?

A. A small portion breaks loose.

Q. Then you call it an embolus.

A. Yes, that's right.

Q. Embolism arises from any kind of immobilization, or mobilization, you say, Doctor?

A. Where there is a predisposing cause.

(Testimony of Dr. O. F. Call.)

Q. Does immobilization cause stagnation of the blood in the veins? A. It does.

Q. And stagnation predisposes embolism.

A. Predisposes thrombosis.

Q. And then it breaks off because of some acute action? A. That is mobilization.

Q. Acute or undue action?

A. Yes, sir. [30]

Q. Do Thrombosis or thrombus come in due course of treatment without surgery?

A. Yes, sir, Typhoid produces thrombosis, varicose veins, injury external violence all produce thrombosis.

Q. Do I understand that you have had only three post-surgical deaths in your practice?

A. If you do you are wrong. I said three pulmonary embolism deaths.

Q. How many post-surgical deaths?

A. I cannot answer that at this time but three pulmonary embolism post-surgical deaths.

Q. When you commence surgical procedure you are fully aware that you can expect pulmonary embolism?

A. We know it is possible but we don't expect it.

Q. It is foreseeable in any case.

A. It is not foreseeable. If it was we would not be operating like we do.

Q. Do you have to take safeguards?

A. Yes, sir.

Q. Then if it is not, and was not foreseeable why do you take safeguards?

(Testimony of Dr. O. F. Call.)

A. It is a possibility but it is not foreseeable.

Q. It is foreseeable in the sense that it might happen.

A. It is a possibility but it is not foreseeable.

Q. Perhaps we are playing on words, Doctor. When you start [31] surgery it is something that might happen in every case?

A. You think of it. It might happen.

Q. Isn't it a fact that the majority of surgical cases,—strike that,—isn't it a fact, Doctor, that the majority of surgical deaths are due to embolism?

A. No, sir.

Q. Have you ever read Cecil on Medicine?

A. Yes, sir.

Q. Is it a standard work? A. Yes, sir.

Q. Is it a standard work? A. Yes, sir, it is.

Q. If he said the majority of post-operative deaths are due to pulmonary embolism in hernia cases, would you agree with that?

A. It would be one man's opinion.

Q. Is the Journal of The American Medical Association a reputable publication?

A. Yes, sir, it is.

Q. Do you know Doctor Barnes of the Mayo Clinic? A. I know of him indirectly.

Q. Would you say this was a correct statement in an article in the Journal of the American Medical Association by Doctor Barnes: "If such a percentage of deaths from pulmonary embolism is applicable to the general population [32] and the ratio remains the same in succeeding years, it may be assumed that

(Testimony of Dr. O. F. Call.)

three million sixty-eight thousand people now living in this country will die eventually of pulmonary embolism."

A. That does not refer to surgical pulmonary embolism.

Q. Pulmonary embolism of all kinds.

A. Yes.

Q. Now, Doctor, pulmonary embolism can come from immobilization.

A. Pulmonary embolism can come from having a baby, from typhoid, from scarlet fever and many other causes.

Q. Would you call a person dying from pulmonary embolism at childbirth an accidental death?

A. I don't know whether I would or not.

Q. It is reasonably foreseeable in every childbirth?

A. It is not foreseeable, it might be thought of.

Q. You take it rather lightly in case of childbirth?

A. You might think about it. You can't say that it is foreseeable. It must be so you can see it in order to say it is foreseeable.

Q. Well, it is something you can anticipate?

A. It is something you can think of.

Q. It is a hazard in operations,—it is a risk.

A. Yes, it is a risk.

Q. That is true in hernia operations?

A. That is true in any operation. [33]

Q. Isn't it true that the rate of death from pulmonary embolism is five times as high from inquina-

(Testimony of Dr. O. F. Call.)

or femoral hernia operations than it was from acute appendicitis operations, excluding peritonitis or cases with ruptured appendix?

Mr. Davis: Objected to as immaterial.

The Court: He may answer.

A. My opinion on that would be based upon statistics taken from other men against this man's statistics.

Q. You would have no personal knowledge on that? A. No.

Q. Isn't it a fact that the reason—if it is a fact, Doctor, that there are five times as many post-operative deaths following hernia operations than following appendix operations, is due to the fact that hernia occurs later in life, and repairs to hernia are made later in life than appendectomies?

A. That is not my opinion that it is always the case.

Q. Do you think, Doctor, a man sixty-one is more predisposed to embolism than a much younger man?

A. Sure, that is true.

Q. Mr. Wilson was more predisposed than a younger man, now Doctor, getting to the question of accident, let me ask you this, take the case of post-operative pneumonia, is that an accident?

A. You mentioned before, ether pneumonia, there is that and [34] the person who has respiratory trouble.

Q. With that person it would not be post-operative. A. No, sir.

(Testimony of Dr. O. F. Call.)

Q. In case of death due to post-operative shock, would you call that accidental?

A. No, I don't think so, that was due to a physical condition.

Q. Doctor, do you think in this case that this man had thrombosis? A. I think so.

Q. That was a pre-existing condition?

A. I think so.

Q. Therefore it wasn't an accident.

A. It was accidental.

Q. But the pre-existing condition in the pneumonia and shock case was not accidental.

A. They are not comparable, no, they are not comparable to embolism.

Q. It was a pre-existing condition and surgery caused his death in the one case; here you say there is a pre-existing condition which caused his death because of embolism?

A. One is pneumonia from an existing condition, a respiratory condition and then there would be the other condition that also existed——

Q. ——Just a moment, Doctor, let's take the other case, where the shock was not observed, would that be an accident?

A. That is not always an accident. [35]

Q. Post-operative shock.

A. Post-operative shock, that is a condition due to the fact that the patient's condition was such that he couldn't stand surgery.

Q. Is that accidental?

A. That is incident to the operation.

(Testimony of Dr. O. F. Call.)

Q. In all cases of surgery these various things being rare, are nothing but natural consequences in a certain number of cases.

A. You may say they are things to be expected in a certain number of cases.

Q. They follow in a certain number of cases as a natural consequence.

A. They are not natural.

Q. When you operated for the repair of the hernia;—strike that,—when you operate for the repair of any hernia and there is a pre-existing condition in the venous system that results in death, are those things a natural chain of events, when you start to repair that hernia, due to the condition existing when you start your operative procedure?

A. Referring now to the case of the embolism.

Q. I am taking that assumption.

A. Then in that case the pulmonary embolism would be from violent exercise or exertion coming from something after the operation.

Q. Which would be incident to the operation. [36]

A. Following the operation.

Q. And incident to the operation?

A. Well, like a man being killed in a car accident, it is incident to riding in the car.

Q. Those things you recited followed through to the death.

A. That is right.

Q. If you hadn't started to repair the hernia would the man have died?

A. The man could have been walking down the street and be seized with a coughing spell and with

(Testimony of Dr. O. F. Call.)

the coughing and expectoration have died of an embolism.

Q. In this case if you immobilized him without surgery and had not started to repair this hernia would he have died?

A. Immobilization does not produce embolism.

Q. Then it was your repairing of the hernia which, through a chain of events all resulted in his death?

A. It is incident to it.

Q. Are you of the opinion that the condition of the venous system is a disease entity?

A. It may be a disease entity or not.

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so, Doctor?

A. If you have a diseased venous system you can expect untoward results. [37]

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That is right.

Q. Are you of the opinion that there are potential blood clotters as well as bleeders?

A. Yes.

Q. What test did you make for the clotting index?

A. The clotting time and bleeding time.

Q. Will you show that on the hospital chart?

A. I am not sure it is there, it is done in the laboratory and I am not sure whether it is here or not. It is not always done. There is a laboratory report

(Testimony of Dr. O. F. Call.)

here and it shows the RBC or red blood count 4,300,-000 WBC, white blood count 7500 HB 15.2 that is hemoglobin, there is other information on this chart but it does not show clotting time. All the information shows a normal condition. It does not, however, show any report of clotting time.

Q. So that there might have been a condition in the venous system or the clotting potential that may have contributed to this embolism?

A. We can prove here that he had a normal blood count, a normal hemoglobin and we don't expect a departure in clotting.

Q. But that is not always true?

A. That's right. [38]

Q. The blood chemistry might have been such that he was a potential clotter.

A. We have no proof either way.

Q. If that was the case it would be a condition that existed?

A. Assuming that he was a potential clotter.

Q. There was no test that we know of to show that he was or not.

A. No test was made.

Q. Is the cough such as mentioned a symptom, or symptomatic of a heart involvement?

A. Not necessarily.

Q. Is it a symptom of heart disease.

A. One of the symptoms.

Q. I may be mistaken, Doctor, but did you make the statement that in surgical procedure there was never any reason to expect embolism?

A. I didn't make that statement.

(Testimony of Dr. O. F. Call.)

Q. It is still the greatest scourge to surgery.

A. One of the greatest.

Q. Since penicillin and these other drugs, it is still the greatest scourge.

A. I think it is.

Q. It always stares you in the face.

A. You are trying to make me say that you expect it, that is not right. [39]

Q. You can anticipate it.

A. No, you cannot anticipate it.

Q. Why are measures taken to avoid embolism?

A. Because of the possibility.

Q. You say "possibility" instead of expectation.

A. No—it is a possibility.

Q. It is a hazard—it is present.

A. It is a possibility.

Q. What measures did you take to avoid it, Doctor?

A. What did I take?

Q. Well, what measures do you take?

A. Have the patient moved around.

Q. Pre-operative measures.

A. We look for things that might cause infection that is one thing—from these examinations we look for anything that may cause an infection and some use anti-clotting substances, Heparin and so forth.

Q. They protect against it by anti-clotting substances and thus reduce the clotting possibilities?

A. It is a new thing, done in some clinics.

Q. You didn't do it?

A. I did not. Ninety per cent do not. It is not without danger.

(Testimony of Dr. O. F. Call.)

Q. Doctor, is this a correct statement of the distinction in the diagnosis between pulmonary embolism and acute heart [40] failure: At the outset of pulmonary embolism—rather at the onset of pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

Mr. Davis: I will object to that question unless—no, I will withdraw the objection.

Q. What I refer to is the diagnosis of pulmonary embolism and acute heart failure. The only difference is that at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

A. The time element in acute heart failure might be the difference, but the color, cyanosis is also present in embolism.

Q. This patient was operated at eight in the morning and at eleven that night he started on the last terminal period. A. No.

Q. You operated at eight or nine in the morning.

A. Yes, sir.

Q. And at eleven that night he started on the last terminal period. A. He certainly did not.

Q. That is your opinion of this hospital chart, Doctor? A. That is my opinion.

Q. Doctor Call, commencing about midnight of April 8, at 12:30 it says "respiration very irregular, deep at times [41] then patient seems to cease breathing for a few seconds and cyanosis of lips is obvious.

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. And you think he had started on the terminal period. A. No, sir.

Q. In this it says——

A. ——It says there that the pulse is irregular but strong.

Q. At 12:30 the chart shows cyanosis of lips, will you explain what cyanosis is?

A. It means a blue color of the skin, particularly the face due to lack of aeration in the lungs; that can come from holding one's breath. By snoring they stop breathing and also by the swallowing of the tongue, that is what this patient was doing.

Q. Did this patient do that at this time?

A. He was snoring all afternoon and all night. He was snoring at intervals all evening.

Q. You were there two or three times.

A. In the afternoon two or three times and at night again.

Q. Referring to 12:30, do you see any record of snoring when he started to turn blue?

A. He snored long before 12:30. The nurse doesn't chart the snoring at 12:30.

Q. The last time there was a record of it was 11 o'clock.

A. 11 o'clock, pulse good and color good, expectoration of [42] phlegm, respiration irregular but deep.

Q. And at 12:30 respiration very irregular and deep. A. Yes, sir.

Q. How do you account for his turning blue at midnight?

(Testimony of Dr. O. F. Call.)

A. I account for it from the fact that he was snoring whenever he was asleep and holding his breath.

Q. You are speculating on that?

A. It is a circumstance. It is not in the record but the nurse mentioned him snoring when I was there.

Mr. Eberle: I move to strike what the nurse said, if she is available they can get her.

The Court: That portion of the answer may be stricken.

Q. You are of the opinion that the clot broke loose from the pelvic vein?

A. That is the most probable place it would be.

Q. You don't think that clot could have come from the manipulation in the surgical procedure?

A. I don't think so.

Q. This clot might have come from any other portion of the venous system, in the extremities.

A. Particularly from the pelvis, that is the most common.

Q. If he coughed on the street the same thing could have happened.

A. It could have happened, where there is a pre-existing thrombus. [43]

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema.

Q. Are those accidents?

A. That is according to the definition of accident.

Q. That could happen in any case.

(Testimony of Dr. O. F. Call.)

A. Sure.

Q. Assuming that a person has been to you for examination or in regard to a heart involvement, and you use the stethoscope, take X-rays of the chest, cardiograms both before and after exercise, taking all the tests you know and you find no pathology and the next day that man died of coronary occlusion or acute heart failure, would you call that an accident?

A. I don't know. It is something that is unexpected. After all these tests in certainly is something that is unexpected.

Q. Then you would say it is accidental?

A. I don't know. I didn't say that.

Q. Isn't it liable to happen?

A. Yes, but it is unexpected.

Q. It is something you can anticipate at any time in any person. A. I guess so.

The Court: We will adjourn at this time [44] until 1:30 this afternoon.

1:30 p.m., March 17, 1948

Mr. Eberle: I would like to offer exhibit 9 at this time, being a photostatic copy of the physician's report.

The Court: If there is no objection it may be admitted.

Q. Doctor, when you referred to snoring you referred to heavy breathing where the jaw muscles are relaxed and there is a vibrating of the palate?

A. Yes, breathing through the mouth with the mouth open.

Q. Snoring is a vibrating of the palate?

(Testimony of Dr. O. F. Call.)

A. Yes.

Q. That is because of relaxation of the jaw muscles.
A. Yes, sir.

Q. When you give a sedative it relaxes the jaw muscles and the mouth opens, the palate vibrates and that is snoring.
A. In some people.

Q. In this case.

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?
A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. You can say that except in specific cases.

Q. In this case. [45]
A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated.
A. Natural snoring.

Q. Where there is a sedative or opiate, because of the relaxed condition, secretion runs down the trachea.
A. Yes, sir.

Q. That is true in any case where you have a sedative?
A. No.

Q. Why?

A. Because a lot of people don't relax the jaw muscles.

Q. Where there is a relaxation it is true?

A. Yes, sir, and it produces snoring.

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post-operative procedure?

A. In varying degrees. Some will snore and

(Testimony of Dr. O. F. Call.)

others won't; particularly those who snore anyway, they will snore.

Q. The sedative relaxes the muscles and you have labored breathing because of the sedative?

A. No. The sedative relaxes the body as a whole. In a certain number of people it relaxes enough so that the jaw will drop.

Q. It is not uncommon?

A. It is not very common.

Q. It is a natural consequence of giving sedative in many people? A. A few people. [46]

Q. You only have relaxation and labored breathing in a few people? A. That is right.

Q. It is common in those people under opiates?

A. If you have a person who snores.

Q. Where you have snoring and relaxation after a sedative the secretion flows down the trachea?

A. Yes, sir.

Q. And a person under opiates makes an effort to clear his throat.

A. Not under opiate, but when he is not under he does.

Q. When he wakes up and finds this mucous in the trachea he tries to clear his throat?

A. Yes, that is natural.

Q. That is natural in the post-operative period?

A. In any case where there is mucous gathering in the throat.

Q. You encourage them to get this mucous up?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. If you don't what does he get?

A. Metastatic congestion and atelectasis.

Q. So you encourage him to clear his throat?

A. Yes, sir.

Q. That is the normal process?

A. That's right.

Q. Does the vibration of the palate make any difference to [47] the secretion as that got down in the throat if the person snored?

A. I don't see much difference.

Q. So it doesn't make any difference whether he snored or not?

A. Snoring is apt to draw more mucous down.

Q. Would the mere fact that the palate vibrated make any difference in the amount of secretion?

A. That doesn't make secretion.

Q. That makes snoring?

A. Yes, snoring is a nasal sound.

Q. I thought you said that it was a vibration of the palate? A. That is part of it.

Q. It makes the noise?

A. Only part of it.

Q. And heavy snoring doesn't make any difference to the amount of mucous going down the trachea? A. That is right.

Q. Following an operation where you give an opiate or sedative there is a relaxation and a normal amount of mucous going down the trachea?

A. That's right.

Q. And the patient is encouraged to cough that up when he wakes up?

(Testimony of Dr. O. F. Call.)

A. That is right. [48]

Q. When did you first decide that this death was accidental?

A. Shortly after the operation, when I was there at five o'clock in the morning.

Q. Handing you exhibit 9, Doctor, will you give us the date of that?

A. The 22nd of April, 1947.

Q. That was about two weeks after the time you mention?

A. Yes, it was on the 7th he died, no, the 8th.

Q. At that time you were not sure that he died of an accident?

A. I didn't make any mention of accident, I mentioned pulmonary embolism.

Q. The question whether it was an accidental death, what was your answer to that?

A. Yes, providing embolism is classed as an accident.

Mr. Eberle: I believe that is all. I think, however, Mr. Merrill has some question.

The Court: Very well.

Cross-Examination

By Mr. Merrill:

Q. Doctor Call, is it your thought that the death of Harry Wilson was due to embolism?

A. Due to embolism?

Q. —let me finish the question. Do you think, and is it your thought that the death of Harry H. Wilson was due to [49] embolism independent of all other causes?

(Testimony of Dr. O. F. Call.)

Mr. Davis: I don't think that is answerable and I object to it for that reason. It cannot be answered. The question should recite independent of what other causes.

The Court: Of course, the question here is whether the operation was the cause or contributed to or was a contributing cause of the death. The other cause would be immaterial, however, he may answer.

A. An embolism has to have a basic cause for its formation, therefore the embolism would be the immediate cause of death but it would have to have a basic cause for formation.

Q. Therefore a death caused by embolism, was not that death caused by that independent of and from all other causes?

A. I cannot answer that yes or no.

Q. Would there have to be a cause for the embolism? A. Yes, sir.

Q. You say the immediate death was due to the embolism? A. Yes, sir.

Q. Doctor, what is herniorrhaphy?

A. Repair of a hernia.

Q. Was this embolism due to a herniorrhaphy?

A. No.

Q. I hand you what has been marked as defendant's exhibit 10,— [50]

Mr. Davis: I object to the witness being examined on this unless it is shown to him.

Mr. Merrill: Certainly.

Q. Do you recognize that?

(Testimony of Dr. O. F. Call.)

A. A certificate of death.

Q. Did you prepare it? A. Yes, sir.

Q. And certified to it? A. Yes, sir.

Q. That is a certified copy of the death certificate of the death of Harry H. Wilson?

A. I assume it is, it looks like it.

Mr. Merrill: I now offer in evidence the exhibit which is the certificate of death of Harry H. Wilson.

Mr. Davis: This is the certified copy you got from the bureau of vital statistics?

Mr. Merrill: Yes.

Mr. Davis: No objection.

The Court: Admitted.

Q. In answer to the question "immediate cause of death" you write "pulmonary embolism" and under "duration" you write "sudden."

A. Yes, sir.

Q. And in answer to the question "due to" you say; "herniorrhaphy" and under "duration" again you write "24 hours"? [51]

A. Yes, sir; may I qualify that statement? In all death certificates it is required that we give the cause of death and anything that had anything to do with it, and any connection. There could have been three or four causes contributing to the immediate cause of death, herniorrahaphy could only be a contributing cause.

"Q. What did you mean when you answered the question "due to" by using "herniorrahaphy"?

A. I meant it followed the herniorrhaphy.

(Testimony of Dr. O. F. Call.)

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have some effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

Q. Harry H. Wilson had a hernia,—withdraw that,—Harry H. Wilson was operated on for hernia because, of course, there was some need for it?

A. That's right.

Q. Twenty-four hours after, or about that time, following the operation he had what you call an embolism, pulmonary embolism?

A. Not what I call it; he had a pulmonary embolism.

Q. What you have termed a pulmonary embolism?

A. Yes, sir. [52]

Q. That pulmonary embolism was a contributing cause, or—no, strike that, please,—Doctor, that pulmonary embolism was contributed to by the operation?

A. As a secondary cause.

Q. A contributing cause?

A. Contributing.

Q. What could have been the primary cause if the hernia was the contributing cause?

A. Primarily it was due to the fact that there was a thrombus in the venous system.

Q. How do you know that?

(Testimony of Dr. O. F. Call.)

A. From post-mortems in thousands of cases.

Q. You said that you would not be sure without a post-mortem?

A. I testified that I could not be sure without a post-mortem, yes, sir, you are right.

Q. You cannot say positively that he died from an embolism?

A. From circumstances, evidence and history of the case only.

Q. You have no evidence that this clot came from any source other than the hernia operation?

A. I cannot answer that yes or no.

Q. Do you have any evidence whatever that if he died from pulmonary embolism, that embolism came from any other source than this operation?

A. Yes, sir.

Q. What evidence do you have? [53]

A. The evidence is what you would call circumstantial evidence.

Q. When did you come to the conclusion that he died from snoring, Doctor?

A. We came to the conclusion that he died from pulmonary embolism immediately after his death. We search our records before we make a decision; we try to explain it on a basis of existing facts. It is true in any case of death if it is not from external causes that you have to have a post-mortem in order to make a positive statement but we do have enough evidence to make it relatively sure. We came to this conclusion after an examina-

(Testimony of Dr. O. F. Call.)

tion of the case and an examination of the records of the case.

Q. What records?

A. The hospital and operative record.

Q. That is introduced in evidence?

A. Yes. That a herniorrhaphy was performed could be a contributing cause but twenty-four hours after the operation is too soon to have the embolism in the region of the hernia because of that operation.

Q. If you thought it was done by snoring why didn't you put it on the death certificate?

A. No place for it.

Q. What does the next sentence mean?

A. The same,—herniorrhaphy.

Q. What was the herniorrhaphy due to? [54]

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy? A. That's right.

Q. If he hadn't had the herniorrhaphy he would have had no embolism.

A. We don't know that.

Q. If there had been no operation there would have been no death?

A. We don't know that.

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

(Testimony of Dr. O. F. Call.)

Q. You are sure of that? A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that? A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death? [55]

A. Fundamentally, yes.

Q. And that was for the hernia? A. Yes.

Q. If this breathing or this snoring had anything to do with it, the operation was necessarily the inciting cause, was it not?

A. Yes.

Q. You would not have expected him to have died from snoring or breathing or anything it produced without the operation?

A. I don't think he would.

Q. And the operation was for hernia?

A. That's right.

Q. You stated that he was operated on twice?

A. That is right.

Q. Once for a bowel obstruction?

A. That is right.

Q. The second time was for hernia?

A. Yes, sir.

Q. And this was the second hernia operation?

A. That is right.

Q. If there was any clot that resulted in the

(Testimony of Dr. O. F. Call.)

embolism, it was certainly due to some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation? [56]

A. Yes, sir.

Q. It was what we could term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Davis:

Q. You were asked: "you would not have expected the patient to die without any operation" and you answered that "no"?

A. That's right, I would not expect him to die.

Q. Now, Doctor, you wouldn't and didn't expect him to die with the operation, did you?

A. No, I did not.

Q. There wasn't anything in the operation or

(Testimony of Dr. O. F. Call.)

preceding the [57] operation that led you to think the man might die?

A. That is right, there was not.

Q. When you speak of contributing cause, you are answering that generally and not with reference to your diagnosis of this particular case or this particular death? A. That is right.

Q. You are still of the same opinion that you were on direct examination that the cause of this man's death and the cause of this embolism was the violent, unusual and extraordinary coughing and snoring. That in your opinion was likely to cause this embolism to break loose?

Mr. Merrill: Objected to as an improper question.

The Court: He is qualified here as an expert; he may answer.

A. The cause of the death was acute embolism, pulmonary embolism which was caused by violent action to break the embolism from the thrombosis.

Q. Was there anything indicated to you at the time you operated or gave him the sedative that caused you to believe that he would develop this extraordinary condition of snoring or breathing or holding his breath?

Mr. Merrill: Objected to, there is no testimony to support this type of question.

The Court: I will permit him to answer. [58]

A. No.

Q. Doctor Call, with reference to your experience in operations, was or was not the condition

(Testimony of Dr. O. F. Call.)

that existed there or the condition that developed with reference to the snoring, choking and the stopping of breathing a most extraordinary condition? A. It was.

Q. And was it to be expected?

A. No, sir.

Q. It was not to be expected that it would develop? A. No, it was not.

Q. Was it an unforeseen occurrence?

Mr. Merrill: Objected to as repetition.

The Court: He may answer.

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden, unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation? [59] A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

(Testimony of Dr. O. F. Call.)

Q. Was it a mishap? A. It was.

Q. Did he die, in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation? A. That's right.

Q. Was it undesigned? A. It was.

Q. Was it a chance? A. It was. [60]

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

Mr. Merrill: Objected to as leading.

The Court: He has answered and the answer may stand.

Q. Now, Doctor Call, you testified that there was a possibility in every case that a person might die. Do you understand that possibility comes within the definition of accident?

Mr. Merrill: I object to that, it is beyond the opinion or conclusion of an expert.

The Court: I would like to have the Doctor reconcile this answer, or rather the answer to the

(Testimony of Dr. O. F. Call.)

question previously asked with the answer to Mr. Merrill's question. He answered Mr. Merrill's question that it was a contributing cause of death.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, Doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration.

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforeseen by the driver,—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole?

(Testimony of Dr. O. F. Call.)

A. That's right.

Q. Then you testify that if the man had not had the hernia [62] this choking would not have occurred and that the hernia is not the cause, or did not cause death.

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there,—is that what you meant, Doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death? A. That is right.

Q. And that is your studied opinion?

A. Yes, sir.

Q. Any man in this Court room may die before he gets to the foot of the stairs?

Mr. Merrill: Objected to as immaterial.

Mr. Davis: This was all gone into on cross.

The Court: He may answer. [63]

A. Certainly.

Q. But it would certainly be a calamity?

A. Yes, and unexpected.

(Testimony of Dr. O. F. Call.)

Mr. Davis: That is all, Doctor.

Recross-Examination

By Mr. Merrill:

Q. If the snoring was the chuck-hole as you say and the immediate cause of death was——

A. ——I said it was the chuck-hole that caused the embolism, the snoring was comparable to the chuck-hole in the road that caused the car to turn over.

Q. It all comes back to the operation?

A. That is comparable to the car in which he was riding.

Q. It was the commencement, the thing that set in motion everything that resulted in the death. The cause of the death.

A. The operation was the contributing cause of the death. A. Yes.

Q. And it was due to hernia? A. Yes, sir.

Q. The hernia was the contributing cause of death? A. That's right.

Q. There is no accidental means involved?

A. No external violence. [64]

Mr. Merrill: That is all.

Recross-Examination

By Mr. Eberle:

Q Doctor Call, I am not clear on this Did you reason that the snoring was the cause of the breaking of the thrombus and the cause of the embolus getting into the blood stream?

(Testimony of Dr. O. F. Call.)

A. The violent action of the snoring broke the embolism from the thrombus or thrombosis.

Q. If I snore I may break a thrombosis loose and cause an embolism?

A. I am testifying about this case, Mr. Eberle.

Q. Just the snoring broke loose the embolus?

A. I didn't say the snoring, but the snoring and the violent action.

Q. The snoring and coughing?

A. The violent action.

Q. Did the snoring break loose the embolism?

A. I didn't so testify.

Q. But is it your testimony that the snoring and coughing did?

A. The snoring, coughing and the violent action.

Q. What would snoring have to do with the breaking loose of a thrombus in the pelvic region?

A. The snoring produced a lot of mucous in the respiratory tract and that dropped into the throat; this made him [65] struggle and the struggling would break it loose.

Q. It was coughing and struggling; I thought you testified that snoring was a vibration of the palate? A. That is what you said.

Q. What did you say?

A. It was a form of breathing associated with the vibrating of the palate.

Q. How does it differ from labored breathing?

A. It relaxes and drops down and shuts off the breath.

Q. What shuts off the breath, Doctor?

(Testimony of Dr. O. F. Call.)

A. The tongue, and the secretion dropping into the throat.

Q. That is due to the sedative given the patient?

A. No, sir, not the sedative.

Q. The relaxation of the muscles causes the tongue to drop back?

A. Yes, and the violent catching of his breath again forces it back to the normal position.

Q. The mucous and secretion that get down in the trachea due to the relaxation from the opiate.

A. Not that,—it was mucous in the respiratory tract.

Q. Yes, and you clear that out,—naturally you clear your throat when that gets down in the throat? A. If you are not asleep.

Q. When you are asleep the natural tendency is to drain down?

A. The tendency is the same whether he is given an opiate [66] or not. A snorer does the same thing without an opiate.

Q. In ordinary life he would do it without an opiate? A. That's right.

Q. His action during this operation and subsequent was no different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in the hospital?

A. He was quite a snorer in an operation or not in an operation.

(Testimony of Dr. O. F. Call.)

Q. His coughing and snoring was no different?

A. No different except his condition was weakened by reason of his being a sick man.

Q. Then you think this happened because of his weakened condition? A. Sure.

Q. So after all, Doctor, the contributing cause was by reason of the weakened condition or bodily infirmity, by reason of his condition at that time?

A. That's right.

Q. Now, we have two bodily infirmities that he had. Thombosis formed about four years prior when he had the original hernia operation and his condition—— [67]

A. ——he had another operation also.

Q. But it was an operation for hernia he had some four years ago, wasn't it? A. Yes, sir.

Q. At that time there was a bodily infirmity in the way of a thrombosis? A. Yes, sir.

Q. And it was because of his coughing that the thrombus was broken loose and went into the blood stream? A. Yes, sir.

Mr. Eberle: I think that's all.

Mr. Merrill: Nothing further.

Mr. Davis: That's all, Doctor. I will call Doctor Brothers.

W. W. BROTHERS,

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. What is your profession?

A. Surgeon.

Q. How long have you lived in Pocatello, Doctor?

A. Since 1919.

Q. How long have you specialized in surgery?

A. I was certified as a specialist in 1926 by the American [68] College of Surgeons.

Q. You are a member of the College of Surgeons?

A. Yes, sir.

Q. And have you done post-graduate work in surgery from time to time?

A. Yes, sir.

Q. You were an officer in the first world war?

A. Yes, sir.

Q. Did you do surgery extensively then?

A. Yes, sir.

Q. You were in the last world war?

A. Yes, sir.

Q. Your rank at discharge was what?

A. Colonel.

Q. Were you in that war in the capacity as a Doctor from the commencement to the close of the war?

A. Yes, sir.

Q. Were you in charge of any Government Hospital?

A. Yes, I was.

Q. Where abouts?

A. In charge of all medical installation at Head-

(Testimony of W. W. Brothers.)

quarters in Algiers, A F H Q, also in charge of medical and surgical installation at Supreme Headquarters in London and Paris and Frankfort.

Q. Did you do surgery there? [69]

A. Very little.

Q. Was it done under your supervision?

A. Yes, it was.

Q. How extensive was that?

A. Most of it was referred, we didn't do a lot at headquarters.

Q. You were consulted in those matters all the time? A. Yes, sir.

Q. You are a graduate of a recognized medical school? A. Yes, Northwestern University.

Q. Did you know Harry H. Wilson, personally?

A. Yes, sir.

Q. Were you at any time his family physician?

A. I took care of Harry a time or two, years ago.

Q. You were well acquainted with the family?

A. Yes, sir.

Q. You took care of his children?

A. Yes, sir.

Q. And of Mrs. Wilson? A. Yes, sir.

Q. You were familiar with his physical condition, generally? A. Yes, sir.

Q. And his general characteristics?

A. Yes, sir.

Q. Could you give us an estimate of how many hernia operations you have performed or assisted in performing?

(Testimony of W. W. Brothers.)

A. I don't know, I haven't kept any record. I have done a [70] lot of hernias. I did over a hundred the first year in the army in World War One.

Q. Have you done six or seven hundred?

A. At least.

Q. Out of the six or seven hundred, how many post-operative deaths from hernia operations by pulmonary embolism have you had?

A. None.

Q. How many post-operative deaths from any cause after these hernia operations have you had?

A. I have never had a hernia patient die.

Q. I assume in all operations,—hernia, pelvic and abdominal operations that you have performed,—I suppose you have performed a great many, probably more than a thousand?

A. Yes, sir.

Q. How many post-operative—in all of those operations have you had pulmonary embolism?

A. I have had one.

Q. What is your opinion as to whether post-operative death following operations for hernia where the cause is pulmonary embolism is a rarity?

A. It is very rare.

Q. Would that be unexpected?

A. Yes, sir.

Q. Now, Doctor Brothers, you as a surgeon are familiar, and [71] from studies you have an opinion as to when post-operative deaths, following operations, are most likely to occur from embolisms?

(Testimony of W. W. Brothers.)

A. How soon following operations are deaths from embolisms likely to occur?

Q. Yes. You have an opinion as to that, do you, Doctor?

A. Yes, sir, it is most likely to occur from the second week following the operation to the third week. They occur at a time when the patient is thought to be practically well, or well on the road to recovery.

Q. Have you carefully studied the hospital chart and the bedside notes marked exhibit 7 in this case?

A. Yes, sir.

Q. That is the history and record of Harry H. Wilson?

A. Yes, sir.

Q. Have you read the deposition of Doctor Beeson, Doctor Swindell, Doctor Pittenger and Doctor Stewart?

A. Yes, sir.

Q. Have you familiarized yourself as much as possible with the record and the testimony that is available concerning Mr. Harry H. Wilson, now deceased?

A. I have.

Q. Do you have an opinion as to the cause of his death?

A. I have.

Q. What is that opinion? [72]

A. I think he died of pulmonary embolism.

Q. In your opinion, from the record, and I think you heard the testimony of Doctor Call?

A. Yes, I did hear it.

Q. From the record and that testimony was that pulmonary embolism an event that took place without foresight and expectation?

A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. Was it an undesigned, sudden and unexpected event? A. Yes, sir.

Q. And was it by chance? A. Yes, sir.

Q. Was it an undesigned and unforeseen occurrence of an afflictive and unfortunate character? A. Yes, sir.

Q. Was it a casualty? A. Yes, sir.

Q. Was it a mishap? A. Yes, sir.

Q. Now, Doctor, in your study of the history of this case is there anything to indicate that this man had any profound shock after the operation, before his death? A. No, sir.

Q. What do you say as to whether he had any shock at all?

A. According to the record there was no evidence of surgical shock. [73]

Q. Why do you say that?

A. The nurse's notes chart the patient's pulse at regular intervals and his pulse did not exceed 72 at any time after the operation.

Q. If he was suffering shock after the operation what would his pulse be?

A. Rapid, feeble pulse. Very rapid, a hundred and over, on up to where they cannot count it.

Q. Now, Doctor Brothers, what, in your opinion, caused this pulmonary embolism and why do you say it was accidental?

A. The exciting cause of the pulmonary embolism in my opinion was the exertion of his unusual type of snoring and coughing, that is the exciting cause. The remote cause is, of course, a thrombus.

(Testimony of W. W. Brothers.)

There has to be thrombosis or some foreign material to produce embolism.

Q. Anything in the blood stream that is caused to move by coughing or anything else would cause pulmonary embolism? A. Yes, sir.

Q. Is there anything, in your opinion, basing it on your long experience, that would have indicated or caused a surgeon to expect this violent or extraordinary type of snoring and this exertion?

A. No.

Q. Was it unexpected? A. Yes, sir. [74]

Q. What is your opinion, Doctor, as to whether pulmonary embolism—strike that, please,—in your opinion is there any substantial difference in the symptomatology of pulmonary embolism and thrombus? A. Yes, sir.

Q. What is the difference?

A. They are different conditions. Thrombosis may exist without symptoms, entirely without symptoms, pulmonary embolism is very dramatic, a sudden thing, and causes death in a very few minutes if it is a large embolus?

Q. With reference to the percentage of deaths that follow hernia as post-operative deaths, what is your opinion as to whether that is high or a very low percentage?

A. In my opinion it is very low. In my personal experience I never had one. I never saw any of my associates have one.

Q. You heard my question of Doctor Call from this Text Book by TeLinde. A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. Is that a recognized work?

A. Yes, sir.

Q. It is prepared by a Doctor who was taking his record, or making his record from the results of Johns Hopkins and Mayo Clinics?

A. Yes, sir. [75]

Q. Now, Doctor, I call your attention to a statement on page 87 as follows: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." Do you agree with that?

A. Yes, I do.

Q. The accident may occur in surgery without being the result,—let me put it this way. The accident may occur in surgery without surgery being the cause of the accident?

A. Yes, sir, that is right.

Q. Referring to post-operative deaths. The accident after surgery doesn't mean that surgery is the exciting cause of that death, or that surgery caused the death at all?

A. No, sir.

Q. There can be accidents in surgery?

Mr. Merrill: We object to that as argumentative, leading and suggestive.

The Court: The rule is that a pretty broad scope is allowed where you are examining an expert as this witness is. You may continue with the question.

Q. There is an occasional accident in surgery the same as there may be an accident in anything else?

A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. The accident would not have to be caused by the surgery at all, would it, Doctor?

A. No, sir. [76]

Mr. Merrill: Move to strike the answer for an objection.

The Court: It may be stricken for the purpose of the objection.

Mr. Merrill: Objected to as leading.

The Court: Overruled, the answer may be reinstated.

Q. That, as I understand it, in your opinion, is what happened. There was an accident not connected with the surgery. A. That's right.

Q. It is your opinion that surgery was not the contributing cause to the pulmonary embolism at all?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is right.

The Court: I think that question was a bit leading, Mr. Merrill, but this is an expert and it is tried before the Court. The answer may stand.

Mr. Davis: That is all, Doctor.

The Court: We will recess for ten minutes.

3:45 P.M., March 17, 1948

Mr. Davis: I wonder if I may ask another question or two.

The Court: Yes, you may.

Q. It was your opinion based on the facts pro-

(Testimony of W. W. Brothers.)

duced here which [77] facts are available to you in this matter,—may that be stricken, please?

Q. Doctor Brothers, will you give us your opinion based upon the facts as produced here, which are available to you in this matter, as to whether or not this death would have been likely to occur under the same conditions, of extra-ordinary snoring and coughing, regardless of whether the operation had been performed or not?

Mr. Merrill: Objected to as not proper, there is no foundation and it calls for a conclusion and therefore it is incompetent.

The Court: He may answer.

A. Yes, sir, I think he probably would have died just the same whether he would have been operated at all.

Q. In your opinion it would have been an accident as it has been defined here? A. Yes, sir.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Eberle:

Q. With reference to the testimony as to an accident. Is death an accident?

A. It is not so defined, always.

Q. In your opinion is death an accident?

A. Sometimes. [78]

Q. Is it an accident when it is dramatic?

A. That is part of the definition of accident, a dramatic occurrence.

Q. Not every dramatic death is an accident, is that correct? A. I would not think so.

(Testimony of W. W. Brothers.)

Q. Suppose that Mr. Wilson went home to dinner and sat down, cleared his throat and had an embolism and died, would that be an accident?

A. I think so.

Q. If a person dies while sitting in a chair, of embolism, is that an accident?

A. I think so.

Q. Is post-operative pneumonia an accident?

A. Not ordinarily, no.

Q. Is post-operative shock an accident?

A. I don't think so.

Q. It would be dramatic? A. Yes, sir.

Q. It would be sudden?

A. Not as sudden as embolism.

Q. Pretty sudden?

A. Rather a short time.

Q. Would it be undesigned?

A. Without design, I think so. [79]

Q. But still not an accident? A. No.

Q. Would it be expected?

A. You would have more warning, depending on the type of operation, you might expect shocks.

Q. What percentage of post-operative deaths are due to shock? A. I don't know.

Q. Is it rare? A. Rather rare.

Q. Is it rather rare if you die from post-operative shock and if you die from pulmonary embolism? A. Yes, sir.

Q. What is the distinction?

A. Well, embolism is the breaking off of a clot which is caused by unusual exertion. The break-

(Testimony of W. W. Brothers.)

ing off of this clot causes the fragment of broken portion to float through the blood stream; that happens as the result of unusual exertion. Exertion is the exciting cause.

Q. If I walk down the street and create an embolism and I die, that is an accident?

A. Yes, sir.

Q. That is your opinion of an accident?

A. Yes, sir.

Q. Is that expected, Doctor? A. No, sir.

Q. And shock is not expected? [80]

A. You might expect shock if you had a severe blood loss or a severe operation.

Q. Inasmuch as recent years have produced penicillin and other drugs, what is the greatest single factor that a surgeon has to face with regard to post-operative deaths?

A. I think shock is one of the greatest.

Q. Not embolism?

A. It does not occur to me that it is that common.

Q. Do you belong to the American College of Surgeons? A. Yes, sir.

Q. And would you report that as a rare case to the College of American Surgeons?

A. No, there have been lots of reports.

Q. You would not report it as unusual?

A. I think of it as unusual.

Q. I didn't ask you that.

A. No, I wouldn't report it because many have been reported.

(Testimony of W. W. Brothers.)

Q. You said that in your opinion the cause of death was pulmonary embolism. What records did you use? A. The hospital records.

Q. From the hospital record introduced in evidence here as exhibit 7 you concluded from that record that the man died from pulmonary embolism?

A. That is right.

Mr. Davis: That is not a question. [81]

The Court: Perhaps not, but the witness answered. It may stand.

Q. Referring to the pulmonary embolism, did you rely on this hospital record?

A. I think there is enough in the record to indicate that it was pulmonary embolism.

Q. You based your opinion on that?

A. Largely.

Q. What are the symptoms of pulmonary embolism?

A. It has a very few preliminary symptoms. They die within two to fifteen minutes from the onset of the embolus. They die very suddenly. They have very few symptoms, some pain in the chest. They may cough and suddenly stop breathing.

Q. It is the stopping of respiration and pain in the chest? A. Yes, there is that.

Q. Is there any indication of pain in that record in the last hour or two?

A. There is no mention of pain.

Q. Did you hear Doctor Call testify that he was

(Testimony of W. W. Brothers.)

familiar with the snoring and breathing condition of Mr. Wilson? A. Yes, sir.

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir.

Q. Why did you say it was unexpected if Doctor Call knew in advance that he had this coughing?

A. The Doctor didn't know he had the thrombus.

Q. Why was it unexpected if he knew of the bodily infirmity with reference to the snoring and so forth?

A. If you consider that the exciting cause, he still has to have the thrombus.

Q. Did you hear Doctor Call say he knew he had several operations for hernia prior to this operation? A. I understood that he had one.

Q. Does a surgeon know, where there has been an operation, does a surgeon know there might well be thrombosis?

A. Yes, he might think there might be thrombosis, however, it might be present without symptoms.

Q. Even if there had been a herniorrhaphy or herniotomy; you might anticipate there was a thrombus, isn't that right?

A. I don't think so.

Q. You don't think so, what word would you use instead of anticipate?

(Testimony of W. W. Brothers.)

A. In the absence of symptoms you would not anticipate nor expect a thrombosis.

Q. A surgeon knows where there has been surgical procedure there is a possibility of thrombosis existing? [83]

A. Yes, sir, there is a possibility.

Q. You rather use the word possibility?

A. Yes, that is the word to use.

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time? A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery, but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true.

Q. Generally, where there is a thrombus from which portions may be broken, quite often the amount of coughing is immaterial, isn't that true?

A. Immaterial in what way?

Q. A rather light cough might break the thrombus loose in one instance, or a heavy cough in another? A. Yes, sir; that is true.

Q. It doesn't always take a heavy cough?

A. It would be more apt to break.

Q. Even though he had a comparatively light cough it might have broken off the embolus? [84]

A. It is possible.

(Testimony of W. W. Brothers.)

Q. Speaking of accidents again. In your opinion where an operation is skilfully performed and the man dies, is that an accident?

A. It would depend on what caused his death.

Q. You have heard the statement "the operation was a success but the patient died." In this instance where the surgical procedure was proper and no infection occurred and the man dies, is that an accident?

A. If he dies of pulmonary embolism, I would say yes.

Q. Why do you say that is an accident?

A. It is so definitely an accident. It is an unforeseeable, unexpected and tragic death.

Q. Is there any other tragic cause of death?

A. Gunshot wound.

Q. Post-operative deaths?

A. I don't think you have any like pulmonary embolism.

Q. Is death by coronary occlusion sudden?

A. Yes, it is sudden.

Q. Is it dramatic? A. Yes, sir.

Q. Is it undesigned?

A. Yes, sir,—well, there is a cause for coronary occlusion.

Q. Is it an accident?

A. I would not say so, no, I wouldn't think it is an accident [85] excepting when an embolus is concerned, and that is thrombosis.

Q. You think coronary thrombosis is an accident? A. No.

(Testimony of W. W. Brothers.)

Q. It is dramatic? A. Yes, sir.

Q. Sudden? A. Yes, sir.

Q. Undesigned? A. Yes, sir.

Q. Unexpected?

A. You might expect it if you had a cardiogram.

Q. If the cardiogram showed no pathology,—that is possible, isn't it, Doctor?

A. Yes, it is possible.

Q. Would that be an accident?

A. No, I don't think so.

Q. So thrombosis plugging an artery of the heart with a clot is not an accident, but an embolus coming from the venous system and plugging a vein of the lung is an accident? A. Yes, sir.

Q. Is a surgeon aware of the danger of an embolism or shock every time he operates?

A. Yes, sir, he is always aware of it.

Q. In every operation?

A. Yes, sir, he is always aware of danger.

Q. You never know whether in a particular case there may be [86] an occlusion or thrombosis,—those are dangers that may be present?

A. Yes, but they don't concern you very much because they are very rare.

Q. So rare that you would report it to the American Medical Association if you found one?

A. No, sir.

Q. Have you made any study of the percentage of post-operative deaths due to hernia operations?

A. Not hernia alone.

(Testimony of W. W. Brothers.)

Q. Do you know whether in preparing statistics at Mayo's they have come to the conclusion that there are five times as many pulmonary embolisms following hernia operations as there are in operations for appendicitis?

A. Yes, I know that is a statement they put out.

Q. Where there is a psychological poison due to changes in bodily functions brought about by anesthetic, would you consider that an accident?

A. Psychological?

Q. Yes.

A. I don't understand that, I would rather think you mean pathological.

Q. Would you consider that would be accidental?

A. Yes, I would think so.

Q. From the anesthetic? [87]

A. That would not be the normal result.

Q. Doctor, you say in this case the accident was not connected with the surgery?

A. In my opinion it was not.

Q. Do you rule out the embolus from the lower extremities?

A. Most likely place would be in the pelvic veins.

Q. Ordinarily emboli originates in the lower extremities?

A. Most commonly in the illiac and larger veins of the leg and prostate.

Q. There is no reason that it would not originate in there in this case?

(Testimony of W. W. Brothers.)

A. Except that the original hernia operation might have left a thrombosis.

Q. Yes, except that the original hernia operation may have left a thrombosis.

A. That is right.

Q. As between the two it is pure speculation?

A. That's right, yes, sir.

Q. You stated that you base your opinion upon the theory that the embolus could not be coming from ligation or manipulation because of the short time?

A. Yes, sir.

Q. But there are cases that arise in that short time?

A. That is extremely rare.

Q. But it is possible. [88]

A. That's right, it is possible.

Q. Does so-called snoring increase the secretion that would go down the trachea or does it reduce it?

A. There is somewhat of an irritation by this flapping of the soft palate that might increase the secretion.

Q. It is good procedure to require and to cause the patient to cough up that phlegm?

A. Yes, sir.

Q. Opiates and sedatives are proper procedure?

A. Yes, sir.

Q. They relax an individual, some more and some less?

A. Yes, sir.

Q. It is not uncommon that a person may be relaxed a great deal?

A. That's right.

Q. The jaw muscles of persons relax and the mouth might drop?

A. Might drop open.

(Testimony of W. W. Brothers.)

Q. And he may be so relaxed that those muscles don't operate? A. Yes, sir.

Q. As a result of the opiate,—strike that,—as a result of the relaxation following an opiate and the flowing of this secretion from the relaxation, it is proper procedure to require coughing to bring up the secretion? A. That's right.

Q. That cough might be light or heavy? [89]

A. Yes.

Q. It might be light or heavy and still bring on an embolism? A. Yes, sir.

Mr. Eberle: That is all, Doctor.

Cross-Examination

By Mr. Merrill:

Q. You say that it is extremely rare but possible that pulmonary embolism may come from an operation within a period of twenty hours, that is the effect of your testimony? A. Yes, sir.

Q. So it was possible that this pulmonary embolism may have come from this operation?

A. Possible but not probable.

Q. What, aside from the time in the record that would cause you to conclude that it was not probable? A. Just the time element.

Q. That is all? A. Yes, sir.

Q. You admit that the time element is long enough for a possible embolism from the operation?

A. Yes, I admit it is possible but not probable.

Q. So, therefore, you are basing your opinion on

(Testimony of W. W. Brothers.)

probabilities and possibilities rather than any specific facts?

A. I am basing my opinion on the most likely thing that happened.

Q. But you do and you must admit that it is possible that [90] the embolism was the result of the hernia operation, if it was an embolism?

A. I don't think it was due to the hernia operation.

Q. There is a possibility?

A. A bare possibility.

Q. It does occur in that period of time?

A. Very rarely.

Q. You have nothing except your own opinion and the element of time that causes you to conclude that?

A. That is right.

Q. You speak of embolism caused by thrombosis, now, what causes the thrombus?

A. It is caused by different things; prior surgery; injuries; infection of the vessel walls; foreign material in the blood stream; endocarditis.

Q. And everyone of those go back to a bodily infirmity?

A. Injuries and prior operations, you would not call them diseases.

Q. But it is a bodily infirmity?

A. Yes, it is.

Q. The fact that this man had been operated on twice before that would create a probability for the thrombosis?

(Testimony of W. W. Brothers.)

A. Yes, sir; I think he had some damage to the circulatory system in the abdomen.

Q. If he had not been operated before you know of nothing [91] that could have created thrombosis in Harry Wilson?

A. Yes, it might occur at any time from slowness of the blood flowing. He might have thrombosis and not know it.

Q. It would be due to a bodily infirmity.

A. It might be due to the slowness of the blood stream; it could clot.

Q. It would be a bodily infirmity, a strong, healthy man would not have thrombosis?

A. Yes, he might.

Q. It would be due to bodily infirmity?

A. If you call stasis an infirmity.

Q. Have you any theory upon which you can base your conclusion as to the origin of this thrombosis? A. I don't know where it was.

Q. You cannot say that it wasn't connected with this operation? A. I don't think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following this surgery to have been caused by it.

Q. The element of time is the only thing you have to conclude that? A. Yes, sir.

Q. The thrombosis may have been due to a preceding operation? A. That's right.

Q. You have no means of saying it was?

A. No, sir. [92]

Q. The preceding operation was for hernia?

(Testimony of W. W. Brothers.)

A. Yes, I understand so.

Q. So hernia may have contributed to this embolus.

A. I think it was the abdominal operation.

Q. It was a hernia operation that preceded this one.

A. It is very apt to occur where you have the operation for the internal obstruction.

Q. Have you examined the record of this operation? A. No, sir.

Q. You have nothing upon which to base your conclusion. It is simply a guess.

A. Nothing only I know he was operated.

Q. Do you mean to say, Doctor, that in your opinion Harry Wilson would have died at five o'clock in the morning April 8, 1947, whether there had been any operation or not? A. He might have.

Q. It is your opinion that he would?

A. I think he would.

Q. From what do you think he would have died?

A. Embolism.

Q. What would have caused it?

A. Thrombosis.

Q. When did he have thrombosis?

A. I think he had it before this operation. [93]

Q. What evidence do you have for that conclusion?

A. I don't have any except this record.

Mr. Merrill: That is all.

(Testimony of W. W. Brothers.)

Redirect Examination

By Mr. Davis:

Q. Counsel examined you about post-operative deaths, and in his examination indicated that hernia post-operative deaths were not rare and asked you about a statement concerning Mayo's to the effect that there was five times more post-operative deaths following hernia operations than there was following something else. Now, Doctor, would that determine anything unless you know the number of hernia operations? A. No.

Q. What is the ratio between operations for hernia and appendicitis, is hernia more common?

A. I can't answer that now.

Q. Do you know how many millions of hernia operations are performed?

A. That depends on the type of operations.

Q. And the question of rarity of death following those operations would depend, not upon the percentage of some other disease but on the number of hernia cases as a total and the number of deaths, and that would determine the total would it not, that is, it would determine the total percentage. [94]

A. Yes, sir.

Mr. Davis: That is all.

Recross-Examination

By Mr. Eberle:

Q. Post-operative pulmonary embolism is more likely to occur in older than in younger aged persons.

A. That is right.

(Testimony of W. W. Brothers.)

Q. You know that Mr. Wilson was sixty-one.

A. Yes, sir.

Q. He would be more predisposed to it than a man thirty or forty.

A. Yes, sir.

Q. The reason that post-operative embolisms are more in hernia cases than in appendectomy cases is because appendectomy occurs earlier in life.

A. That is true.

Mr. Eberle: That is all, Doctor.

Mr. Davis: May the Doctor be excused from further attendance?

The Court: Unless counsel want him to stay I think the Doctor should be allowed to go.

Mr. Davis: Plaintiff rests.

DR. MELVIN M. GRAVES

Called as a witness by the defendant, after being first duly sworn, testifies as follows: [95]

Direct Examination

By Mr. Eberle:

Q. How long have you been in Pocatello?

A. About one and a half years.

Q. State briefly your formal education.

A. BA Western Reserve University and MD at Harvard Medical School. I have had about eight years hospital training experience limited solely to surgery.

Q. Have you specialized in surgery for eight years?

A. Yes, sir.

(Testimony of Dr. Melvin M. Graves.)

Q. Are you a fellow in the American College of Surgeons? A. Yes, sir.

Q. Certified by the American Board of Surgery?

A. Yes, sir.

Q. Are you the only Doctor in Pocatello so certified? A. So far as I know.

Q. You have had practical experience in herniorrhaphy?

A. I am a general surgeon and do a lot of hernias.

Q. During those years and while you were an interne what experience have you had with pulmonary embolism?

A. I have seen quite a few such cases.

Q. Have you made a study of the cause and effect of emboli? A. Yes, sir.

Q. Also the statistics as to their occurrences.

A. Yes, sir. [96]

Q. Doctor, will you tell us briefly a surgeon's attitude toward any sort of embolism as to whether it is expected, anticipated and reasonably foreseen?

A. It is one of the complications which a surgeon may encounter in following major surgery.

Q. Is it the principal cause of post-operative deaths?

A. You mean by that, all post-operative deaths—I would rather alter that to limit it to hernia.

Q. Well, limit it to hernia.

A. It is the most common cause in hernia operations.

Q. Are there any precautions to avoid or prevent post-operative embolism? A. Yes, there are.

(Testimony of Dr. Melvin M. Graves.)

Q. State generally what they are.

A. Early ambulation; getting the patient up soon after surgery so he is not bedfast.

Q. Pre-operative procedure I referred to in particular.

A. Well, there are certain clinics where rather radical type of treatment is done, that is ligation of femur veins in both legs on all patients in the older age group who are subject to any major surgery.

Q. Are you familiar with the percentage of cases in all age groups, of post-operative deaths resulting from pulmonary embolism?

A. In large hospitals where such statistics can be gathered [97] approximately one in eight or nine hundred.

Q. That is major surgery of any kind.

A. Yes, sir.

Q. What could you say as to a surgeon commencing surgical procedure as to whether he could reasonably foresee pulmonary embolism in any surgical procedure?

A. It is something every surgeon undertaking an operation knows might happen and hopes won't happen.

Q. It is reasonably foreseeable in any operation?

A. I think that is a fair statement, yes, sir.

Q. What are the statistics with reference to hernia operations?

A. The present mortality rate for all hernias in well-run institutions should run one and a half to two per cent mortality—should be below that—and

(Testimony of Dr. Melvin M. Graves.)

over half of those will be due to pulmonary embolism.

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from pulmonary embolism in hernia operations?

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade. [98]

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group?

A. Yes.

Q. Where is the most prevalent origin of embolus that might result in pulmonary embolism?

A. The best information gathered from autopsy statistics seem to point to the lower veins. In the calf muscles; the tibia which is the bone between the knee and the ankle, that is the most prevalent—the place where the thrombi arises.

Q. Can they arise from immobilization?

A. Yes, sir, they can.

Q. Regardless of surgery?

A. Yes, sir, that's right.

Q. In post-operative procedure or treatment is the use of opiates common?

A. Yes, sir.

Q. And sedatives.

A. Yes, sir.

Q. What does sedatives do to a person—a patient?

(Testimony of Dr. Melvin M. Graves.)

A. It allays pain and depresses centers of the nerve system.

Q. And brings about relaxation?

A. Yes, sir.

Q. What does it do to the breathing where a person is under [99] opiates?

A. It tends to slow the respiration if it was an opium.

Q. Did you examine the hospital record in this case? A. I did, I think it was pantopon.

Q. What effect would that have as to relaxation?

A. That might produce considerable relaxation and tends to slow the respiration.

Q. What happens with reference to secretion and mucous draining to the trachea where a person is under that type of opiate and sedative?

A. It may tend to run down the trachea more than if the patient was awake.

Q. Is that the common and natural procedure and consequence in case of opiates following surgery?

A. Yes, sir.

Q. Doctor, will you explain snoring?

A. It is caused by a relaxation of the jaw muscle which allows the mouth to open. Usually it is associated with an obstruction in the nasal cavity and the passing of air in this manner causes the soft palate to vibrate and the tongue may also drop backward which contributes to the noise.

Q. Would that increase or decrease the mucous draining to the trachea? [100]

A. It has been my observation that most patients

(Testimony of Dr. Melvin M. Graves.)

who have been breathing that way, they tend to have a dry mouth because the air is not going through the nasal passage which is a humidifier and gets moisture in the air.

Q. When a person isn't under opiates and this mucous drains down the trachea what does he do?

A. He wakes with a start and tries to cough it up.

Q. When he isn't asleep?

A. He coughs it up.

Q. That is the mechanism to clear the trachea?

A. That's right.

Q. When he is under opiates that continues to drain?

A. Yes, sir.

Q. The mechanism for bringing it up isn't working?

A. It may not.

Q. Because of his being under the opiate.

A. That's right, that may contribute to it.

Q. When he wakes what is the post-operative treatment as to advising the patient what to do?

A. To turn this patient from side to side and encourage the patient to cough this material up.

Q. And what happens if that is not done?

A. This mucous may get to the smaller bronchi—the smaller air passage and it may lead to atelectasis.

Q. What is that? [101]

A. It is a collapse of the lung.

Q. And results in what?

A. You have a very ill patient and they may, if infection develops on top of the atelectasis, they may die.

Q. It is proper procedure to urge them to cough

(Testimony of Dr. Melvin M. Graves.)

and bring up the mucous? A. That is right.

Q. Did you check the hospital record here, exhibit 7?

A. I checked a photographic replica of it.

Q. Can you tell from that record when Mr. Wilson started to deteriorate?

A. It appears that about 12:30 the respiration seemed to change in character and become irregular and cyanosis was noted at that time. That is apparently when the major trouble started.

Q. From an examination of that record, exhibit 7, could you ascertain the cause of Mr. Wilson's death? A. No, I couldn't.

Q. Assuming that he died at five a.m. April 8, 1948, in the light of that record, from what cause could he have died?

A. He could have died from cerebro vascular thrombosis, — embolism; coronary thrombosis, embolism or pulmonary embolism.

Q. Acute heart failure? [102]

A. That is possible.

Q. Could the cause of his death be determined other than by autopsy?

A. In my opinion, no.

Q. When immobilization takes place for any period of time just state in a general way the effect upon the circulatory system will you Doctor, can you give the process of building up an embolism or thrombus if it has a tendency to do that?

A. Of course, immobilization means putting a

(Testimony of Dr. Melvin M. Graves.)

person at rest, bed rest, and such a situation leads to stasis of the blood.

Q. What do you mean by stasis?

A. The blood slows down in the rate of flow, or stops flowing. This creates, particularly in the veins of the leg—and the reason for this is the return of blood from the lower extremities is not a simple process, it is necessary that the lower extremities be moving, tracting of the muscles helps to propel the blood to the heart. If you have a patient in bed this rate of flow may slow down and it may stagnate.

Q. Where surgery is performed what effect does that have on stagnation in the abdominal and pelvic region and the lower extremities.

A. You have to give some form of anesthesia to place that patient at rest and during that time the circulation [103] becomes poor.

Q. It slows the circulation.

A. Yes, sir.

Q. What does slow circulation do with reference to being a factor in the creation of emboli?

A. It is a major contributing factor. If there is a slight defect in the lining of the vessel, which is common in older people, this slow moving blood is much more likely to clot at that point.

Q. Suppose there is a thrombosis, what effect does the stagnation of the blood and immobilization have on that breaking?

A. Stagnation allows that clot to build up and become larger.

Q. And then break away.

A. In the direction of the heart until it gets to

'(Testimony of Dr. Melvin M. Graves.)

the next major branch. It is like a network of rivers and creeks, a clot is created at a certain point and then this will and does go back to the next largest tributary of the system. It gets into the circulation or the circulatory system.

Q. A thrombosis is attached to a major vessel?

A. Sometimes loosely attached.

Q. What causes it to break away?

A. Muscular activity.

Q. Doctor, what about the condition of the venous system [104] being a separate disease entity?

A. I don't see what you mean.

Q. Is it a co-existing condition?

A. Well, it is one of the systems of the body that has disease processes.

Q. Tell us, Doctor, about the disease process in the veins that is a co-existing condition with surgical procedure?

A. If I understand you—an individual may have little plaques in these veins and you put him in bed for any reason—for a major operation or anything; you immobilize him; that leads to a stasis of the blood in these veins which may lead to thrombosis at the site of this abnormality in the vessel wall. It eventually gets back to this next major tributary as I said and at sometime with what is characterized as a severe muscular strain this clot breaks off and goes into the general circulation; it gets into a vessel that supplies the lung and if it is large enough to occlude this vessel the patient dies; if it is smaller and goes into a smaller vessel of the lung he may cough up blood.

(Testimony of Dr. Melvin M. Graves.)

Q. Can this be designated as a disease process of the veins? A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure? A. Yes, sir.

Q. Can there be a thrombosis or clot remain after surgical operation that is not torn loose but remains in the [105] vessel itself? A. Yes, sir.

Q. That can be loosened later?

A. Ordinarily when a clot remains for any length of time it undergoes reorganization as we say. It becomes definitely attached to the vessel and new blood vessels grow into it. That makes new small vessels through that clot.

Q. But it could break away?

A. Within a certain length of time.

Q. A year?

A. I would say that is a little long. I would say not over three or four months.

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorrhaphy? A. Yes, I think it would.

Q. Explain why?

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is admitted is the principal cause of death and the terminal event is a contributing cause of death.

(Testimony of Dr. Melvin M. Graves.)

Q. Would any effect that was dependent upon the venous system [106] be incidental to that surgical procedure? A. Yes.

Q. And co-existing with it? A. Yes, sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

Mr. Eberle: I believe that is all.

By Mr. Merrill:

Direct Examination

Q. Doctor, assuming that the man died of pulmonary embolism—withdraw that please—Doctor, I understood you to say you studied the chart and the deposition of Doctor Gill? A. Yes, sir.

Q. From such information as you were able to get from that study one cannot say that he died from pulmonary embolism, is that right?

A. I cannot say that.

Q. Would you say that the average practitioner would be able to say that; one skilled in surgery would he be able to say that?

A. In my opinion it would be necessary to have an autopsy.

Q. If he died from pulmonary embolism, would the operation [107] for hernia twenty hours earlier be a contributing cause?

A. In my opinion it would be the chief cause.

(Testimony of Dr. Melvin M. Graves.)

Q. If there had been no hernia there would have been no operation? A. That is right.

Q. If there was no operation there would be no embolism. A. That is right.

Q. If there had been no embolism there would have been no death? A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Mr. Merrill: That is all.

Mr. Davis: No questions.

Mr. Eberle: I would like to have published the deposition of Doctor Beeman, Doctor Swindell; Doctor Pittenger and Doctor James L. Stewart.

Mr. Davis: They can be considered as read from the witness stand, as far as I am concerned.

The Court: Then it will be understood that the Court Reporter can copy them into the record.

Mr. Merrill: With like effect as if read at [108] this time and as if the witness was on the stand.

The Court: It will be understood that the Court reporter can copy them into the record with that effect, Mr. Merrill.

Mr. Davis: We haven't made any objections throughout the depositions.

The Court: And you have read the depositions, Mr. Davis?

Mr. Davis: Yes, Your Honor, and I waive any objection to any one of those questions.

DR. JOSEPH BEEMAN

After being first duly sworn, testifies as follows on behalf of the defendant.

Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. Joseph Beeman.

Q. Where do you reside?

A. Boise, Idaho.

Q. And your profession?

A. Physician and surgeon.

Q. State generally your formal qualifications your education?

A. I graduated from the University of Oregon Medical School in 1937. I have had post graduate training in pathology. [109] I am a certified specialist in pathology, certified by the American Board of Pathology and a member of the American College of Pathologists.

Q. You are licensed to practice medicine in Idaho?

A. Yes, sir.

Q. Were you an instructor in pathology at Oregon? A. Yes, sir, 1939 to 1946.

Q. Did you practice pathology in Oregon?

A. Yes, sir.

Q. During what period did you practice pathology in Oregon? A. 1937 to 1946.

Q. You came to Idaho in 1946?

A. Yes, sir.

(Testimony of Dr. Joseph Beeman.)

Q. And since then you have practiced in Boise?

A. Yes, sir.

Q. What official position do you hold here in Boise?

A. Attending pathologist at St. Lukes and consulting pathologist at the Veterans Administration, Boise.

Q. Since 1946 have you performed any autopsies in southern Idaho? A. Yes, sir.

Q. About what percentage of the autopsies have you performed in Boise?

A. I would say about sixty per cent. [110]

Q. Of all autopsies performed.

A. Yes, sir, in Boise, in other communities I am not familiar.

Q. Now, Doctor, can you give us the approximate number you have had since you have been in Boise?

A. Probably between a hundred and a hundred fifty.

Q. Autopsies. A. Yes, sir.

Q. You have also done autopsies elsewhere?

A. Yes, sir.

Q. Give the approximate number?

A. Something over two thousand.

Q. Have you read the deposition of Dr. O. F. Call, taken in this case?

A. I have read it, yes, sir.

Q. And have you examined the hospital record referred to in this deposition, as exhibit A?

A. Yes, sir.

(Testimony of Dr. Joseph Beeman.)

Q. Now, Doctor, will you briefly describe what is known as embolism?

A. An embolism is the plugging of a hole or the hole in an artery due to foreign materials or due to fragments of blood clot which arises in another primary source.

Q. And what is a pulmonary embolism?

A. A pulmonary embolism is the plugging of the hole in the [111] pulmonary arteries by a foreign material or blood clot which arises from some other source. The pulmonary arteries are the large blood vessels leading from the heart to the lungs supplying the lungs with blood.

Q. Can you distinguish for us embolism and thrombosis? A. Yes, sir.

Q. Do so.

A. Well, a thrombus is a clot of blood inside a blood vessel during life; an embolus is a portion of this blood clot or other foreign material which is set loose in the blood stream and travels through the blood stream. In other words, a thrombus is a clot in the vessel wall, whereas, an embolus is a moving particle of this clot or other foreign body.

Q. Is the symptomatology similar in the case of death of pulmonary embolism and death as a result of coronary thrombosis?

A. The symptoms of death from pulmonary embolism and death from coronary thrombosis may be quite similar.

Q. Doctor, is the case of post-operative death occurring approximately twenty hours after surgery,

[Testimony of Dr. Joseph Beeman.)

n your opinion, can it be determined whether such leath occurred as a result of pulmonary embolism or coronary thrombosis without an autopsy?

A. In my opinion it cannot. [112]

Q. Does a pulmonary embolism originate in the venous portion of the vascular system?

A. Yes, sir.

Q. State just how pulmonary embolism arises in the venous system, will you Doctor?

A. A pulmonary embolism arises in the venous system either by introduction of foreign material such as oil or air into the venous circulation or due to disease of the venous circulation, caused by stagnation of blood, infection or injury; blood clots in the venous system with a resulting venous thrombus; particles of this thrombus or blood clot in the venous system become detached and travel through the veins to the right side of the heart and from there are propelled into the pulmonary arteries causing a blocking of these arteries, or pulmonary embolism.

Q. Assuming, Doctor, that Harry H. Wilson, referred to in the deposition of Dr. O. F. Call, died of a pulmonary embolism approximately twenty hours after a hernia operation, referred to in said deposition, which took place on April 7, 1947. In your opinion would prior surgery, referred to in said deposition, including a hernia operation upon the man have any effect upon such a pulmonary embolism?

A. In my opinion, yes.

Q. In what way?

A. For the reason that an operation for intestinal

(Testimony of Dr. Joseph Beeman.)

obstruction [113] and repair of the hernia could easily have caused a venous thrombus at that time, and the hernia operation on April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism.

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation [114] of blood may in itself cause venous thrombus with resultant pulmonary embolism.

(Testimony of Dr. Joseph Beeman.)

Q. Now, Doctor, referring to the hospital chart or record marked exhibit "A" and from an examination of the hospital record marked "a" when did the process which terminated in death commence?

A. The nurse's notes, beginning at 12:30 a.m. Tuesday, April 8, 1947, indicated that at that time the patient became cyanotic, had irregular respiration and from this time until his death at 4:45 a.m. the nurse's notes indicate the patient progressed into death.

Q. Doctor, from an examination of the hospital record exhibit "A" can one, in your opinion, reasonably conclude that death was a result of pulmonary embolism?

A. From an examination of the record Exhibit "A," in my opinion, I cannot conclude the cause of death, whether from pulmonary embolism or other causes.

Q. Can you conclude from an examination of exhibit "A" that Harry H. Wilson died of a pulmonary embolism? A. No.

Q. Now, Doctor, in your opinion, is post-operative pulmonary embolism reasonably foreseeable?

A. Yes, sir.

Q. It is sufficiently foreseeable that precautions are taken to avoid it? A. Yes, sir. [115]

Q. Assuming the facts stated in the deposition of Doctor Call, and in the hospital record exhibit "A" to be true, and that Harry H. Wilson died about five o'clock a.m. on April 8, 1947, of a pulmonary embolism, in your opinion, was such an embolism, under such circumstances reasonably foreseeable?

(Testimony of Dr. Joseph Beeman.)

A. Yes, under the facts as given, a pulmonary embolism should have been looked for and anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism a natural result or consequence of surgical procedure or immobilization?

A. Assuming skillful surgery without a large amount of manipulation and injury, the pulmonary embolism is a result of co-existing disease process in the venous system and a natural result of surgery or immobilization.

Q. Now, Doctor, in case of inguinal hernia where the operation was skillfully performed without any unusual incident, the operation being very smooth, would there be any large amount of handling or injury such as you mentioned above? A. No.

Q. Doctor, assuming the facts in the deposition of Doctor Call and the hospital record exhibit "A" to be true, and that Harry H. Wilson died of a pulmonary embolism at five o'clock a.m. April 8, 1947, would such an embolism be anticipated under such circumstances?

A. Yes, sir, in any surgical procedure a pulmonary embolism [116] should be anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism accidental?

A. In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated.

Mr. Eberle: That is all, thank you, Doctor.

DR. O. F. SWINDELL,

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name? A. O. F. Swindell.

Q. You reside at Boise? A. Yes, sir.

Q. And your profession? A. Medicine.

Q. You are licensed to practice medicine in the State of Idaho. A. Yes, sir.

Q. State briefly your formal qualifications?

A. My education and so forth, you mean.

Q. Yes.

A. Graduated from Jefferson Medical, Philadelphia, in 1926. Served two years in the Philadelphia General Hospital and came to Idaho in 1928, entered the practice with Dr. [117] E. Laubaugh and practiced with him until 1933 and since that time I have practiced internal medicine in my own office in Boise.

Q. You are practicing internal medicine, specializing in that? A. Yes, sir.

Q. You have been Chief of Staff at St. Luke's hospital?

A. Yes, sir, two or three years during the war.

Q. It was about 1942 to 1945.

A. I think that is right and I was also president of the State Medical Association at one time.

Q. Have you read the deposition of Dr. Call in this case? A. Yes, sir.

Q. Have you examined the hospital record re-

(Testimony of Dr. O. F. Swindell.)

ferred to in the deposition of Dr. Call's as exhibit "A"? A. Yes, sir.

Q. Doctor, can you describe briefly and in as much lay language as possible the nature and description of pulmonary embolism?

A. Pulmonary embolism is the result of a blood clot which becomes free in the blood stream and is carried to the lungs by way of the heart to the pulmonary artery, lodging in a vessel in the involved lung. I might qualify that by saying that a clot or other foreign body. Anything can produce it besides a clot.

Q. Doctor, can you tell us briefly about a thrombus or thrombosis?

A. A thrombus is a clot, a blood clot which forms within a [118] vessel resulting in an obstruction of the vessel at the site of its formation.

Q. Is there any substantial difference in the symptomatology of a pulmonary embolism and a thrombus? A. No.

Q. The embolism arises in the venous system, is that correct?

A. Yes, it could arise in the venous system or arterial system or it may arise in the heart.

Q. All pulmonary embolisms arise in the venous system, is that right?

A. Or the right side of the heart which is theoretically a part of the venous system.

Q. Can you distinguish between coronary thrombosis and pulmonary embolism?

A. Both conditions produce obstruction to the

'(Testimony of Dr. O. F. Swindell.)

involved vessel. In a pulmonary embolism the involved vessel is in the lung in coronary thrombosis the embolism is in one of the coronary vessels of the heart. Symptomatically they are difficult to distinguish.

Q. Can you tell the difference in the origin of the clot in those two, coronary thrombosis and pulmonary embolism?

A. In coronary thrombosis the clot originates in the coronary artery; in pulmonary embolism the clot originates either in the heart or in the venous system.

Q. Can you describe briefly how and in what manner embolism [119] originates in the venous system?

A. When the embolus originates in the venous system there is first formed a thrombus; portions of this thrombus break off and float free in the blood stream producing an embolus.

Q. Can these particles break loose as an incident to surgical procedure? A. Yes, sir.

Q. That would be due to trauma or ligation?

A. Due to a number of factors, one is trauma from surgery, another is immobilization of the patient in bed, other contributing factors are the age of the patient and his general condition at the time of the operative procedure.

Q. Now, Doctor, is pulmonary embolism a reasonably foreseeable thing? Is pulmonary embolism reasonably foreseeable from surgical procedure and immobilization?

(Testimony of Dr. O. F. Swindell.)

A. Any patient who is operated on presents a potential case for pulmonary embolism.

Q. When you mention operations you include operations for hernia.

A. Any kind of operation.

Q. Would the same be true of immobilization as incident to surgical procedure?

A. Yes, immobilization predisposes to the formation of thrombi and emboli. [120]

Q. In your opinion pulmonary embolism is a risk or hazard in every case of surgical procedure or immobilization? A. Yes, sir.

Q. Is there any preventative to prevent or mitigate pulmonary embolism? A. Yes, sir.

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the case of every post operative patient.

Q. Including operations for heria.

A. Yes, sir, including operations for hernia.

Q. Doctor, from an examination of the hospital record exhibit "A", in your opinion is there anything to indicate that the death of Harry H. Wilson was due to pulmonary embolism?

A. The record indicates that the man died very suddenly and death from pulmonary embolism or pulmonary emboli can be sudden, but sudden death doesn't indicate that the man died from pulmonary embolism.

(Testimony of Dr. O. F. Swindell.)

Q. The record, in your opinion would be symptomatic of what?

A. The record mentions that the patient had irregular breathing and irregular pulse, that he was restless. The irregular pulse would indicate that there was some heart disturbance at this time; irregular respiration could be a result [121] of a heart disturbance or the result of administration of drugs to control pain.

Q. In your opinion is a post operative pulmonary embolism accidental?

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is.

Q. Whenever you say surgery that includes hernia operations?

A. It includes all operations whether it is hernia or anything else.

Q. Doctor, in your opinion are post operative deaths following hernia operations more prevalent than in other surgical procedure?

A. The only comparison is in Cecil's Text Book of Medicine in which he states that pulmonary emboli following operations for hernia are five times more frequent than in operations for appendicitis except in cases where the appendix is ruptured.

Q. Is Cecil's Text Book of Medicine a recognized authority [122-3] in the medical profession?

A. Yes, sir, it is.

Q. Doctor, assuming the facts stated in Doctor Call's deposition and the hospital record, exhibit "A" referred to in such deposition to be true and that Harry Wilson died about five o'clock a.m., April 8, 1947, of a pulmonary embolism. In your opinion was such embolism to be anticipated as a natural and probable result of the surgical procedure mentioned in such deposition and in Exhibit "A", and was it reasonably foreseeable?

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls.

Q. Assuming, Doctor, that Harry Wilson died of a coronary thrombosis, in your opinion, would such thrombosis be accidental? A. No.

DR. F. A. PITTENGER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name Doctor?

A. F. A. Pittenger.

Q. You live in Boise. [124] A. Yes, sir.

Q. Your profession?

A. Physician and surgeon.

Q. You are licensed to practice in Idaho?

A. Yes, sir.

(Testimony of Dr. F. A. Pittenger.)

Q. State your formal qualifications, briefly?

A. Well, I have practiced medicine for forty-nine years, ninety per cent of my practice has been surgery.

Q. Your education and training?

A. Graduated from two schools and served an internship, worked for a physician four years on a salary; associate professor of surgery in Honaman Medical in Chicago.

Q. You have been Chief-of-Staff at St. Alphonsus Hospital for a good many years?

A. Twenty-two years.

Q. Doctor, in your half century of surgical practice how many cases of surgery would you say you have had?

A. Oh, I don't know, but many thousands.

Q. Doctor, in your long career as a surgeon you have become familiar with the cause and effect of embolisms.

A. Yes, sir.

Q. Also pulmonary embolisms?

A. Yes, sir.

Q. Will you just state briefly where a pulmonary embolism comes from, Doctor? [125]

A. In case of surgery it ordinarily comes from the site of the operation where a blood clot has formed, this clot, or a portion or fragment of the clot has gotten into the circulation and it continues in circulation until it becomes fastened to the channel in which it is circulating, that is, it gets in a smaller channel where its size prevents its continuing.

Q. Doctor, it is not a fact in the case of surgery, embolism may also come from the fact that the patient

(Testimony of Dr. F. A. Pittenger.)

is immobilized? A. That is right; yes, sir.

Q. In your opinion, Doctor, is a pulmonary embolism accidental, is it an accident?

A. In my opinion it is not.

Q. State your reasons for **that answer.**

A. My personal interpretation of an accident is that it is an unusual and unexpected incident and causes a catastrophe of some degree. Pulmonary embolism following surgery or a surgical operation in the nature of a hernia or pelvic operation is not unexpected because statistically it is the largest single cause of death following surgical operations such as I mentioned. To all men doing major surgery that is one of the biggest hazards in the procedure. He always has that in mind and is on the lookout for that sort of thing, consequently I don't consider it unexpected.

Q. Doctor, would you say in your opinion that pulmonary [126] embolism is reasonably foreseeable?

A. No, I don't think it is reasonably foreseeable, but it is reasonable to expect one.

Q. It is reasonably expectable?

A. Yes, sir.

Q. Are there preventative measures to eliminate or mitigate such embolisms?

A. Recently there has been an effort to use medication which the profession thought might have some bearing on the formation of embolisms, to prevent the formation of the embolus; then there is the after treatment in which we mobilize the patient through some form of movement that will help the circula-

(Testimony of Dr. F. A. Pittenger.)

tion; to guard against complete immobilization, and after the damage is done sometimes efforts are made to prevent further embolisms or embolus. I know of no method possible to use in all cases because the end result is that they are more or less hazardous in themselves.

Q. Doctor, isn't it a fact that fifty per cent of post operative deaths are due to embolism?

A. Yes, that is practically correct.

Q. Have you read the deposition of Doctor Call, in these cases? A. Yes, sir.

Q. Have you examined the hospital record Exhibit "A"? A. Yes, sir. [127]

Q. Assuming the facts therein to be true and that Harry Wilson died at about five o'clock a.m., April 8, the morning after the operation, in your opinion was the pulmonary embolism accidental, was it an accident?

A. Not under my interpretation of an accident.

Q. Would you say under those facts the pulmonary embolism was probable and to be anticipated and expected? A. It was to be anticipated.

Q. And expected.

A. Yes, and expected.

Q. Doctor, from an examination of the hospital record, Exhibit "A" from midnight on April 7th, to the time of his death, in your opinion, was there a condition of profound shock? A. Yes, sir.

Q. Would this be a symptom of pulmonary embolism and could it be symptomatic of coronary thrombosis? A. Yes, sir, it could.

Q. Will you explain that answer?

(Testimony of Dr. F. A. Pittenger.)

A. I am unable to tell from the records to my own satisfaction whether this was a pulmonary embolism or some other type of chest embolus.

Q. Doctor, assuming that the patient Harry Wilson was operated on for hernia about eight or nine o'clock on the morning of April 7, and that he died of pulmonary embolism about [128] five o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause? A. Yes, sir.

Q. Assume Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death?

A. Yes, sir.

Q. Doctor, state whether or not the hernia sustained by Mr. Wilson as disclosed by the testimony of Doctor Call and the Exhibit "A" introduced in evidence, was a contributing cause of the death of Harry H. Wilson? A. Yes, sir.

Q. Doctor, in your opinion, are post operative deaths in the case of hernia and other pelvic operations more prevalent than other types of operations?

A. Yes, sir, they are. They are more prevalent than in other general operations.

Q. In your opinion Doctor, is post operative embolus a natural consequence of surgical procedure and immobilization incident thereto?

A. Yes, sir. [129]

Q. And post operative pulmonary embolism is reasonable foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post operative pulmonary embolism is an accident what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true.

A. I don't believe it is true.

Mr. Eberle: That is all Doctor.

JAMES L. STEWART

Called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name Doctor?

A. James L. Stewart.

Q. Your profession.

A. Physician and surgeon.

Q. You live in Boise? A. Yes, sir.

Q. You are licensed to practice in Idaho.

A. Yes, sir.

Q. State briefly your educational qualifications?

A. I graduated from Rush Medical College, University of Chicago in 1899.

Q. Where have you practiced? [130]

A. One year in Nebraska, a year and a half in Chihuahua, Mexico, and since March, 1902, in Boise.

Q. In your forty-six years in Boise have you specialized in surgery?

A. Yes, most of that time.

(Testimony of James L. Stewart.)

Q. You have performed many thousands of operations?

A. Yes, there are some twenty thousand histories on file in there now.

Q. You were Chief-of-Staff at St. Luke's Hospital for how many years, Doctor?

A. Chief of the organized staff for twenty-nine years and Chief of the hospital thirty-four years.

Q. In your practice of surgery you are familiar with embolisms and particularly pulmonary embolisms?

A. Yes, sir.

Q. Doctor, in your opinion where a hernia operation was skilfully performed without unusual incident and death occurred within twenty hours after the operation, would you say that such embolism was accidental, if death was from pulmonary embolism?

A. No, I don't think I could say that.

Q. Would you say it was expected?

A. It is something that could be expected in a certain number of cases.

Q. Post-operative pulmonary embolism is something that is [131] reasonably foreseeable?

A. Yes, sir, it is foreseeable.

Q. Are pulmonary embolisms more prevalent in hernia and pelvic operations than in other general operations?

A. Yes, more so than in other classes of operations; next in line would be fractures.

Q. Is there preventative procedure to prevent or mitigate pulmonary embolism?

(Testimony of James L. Stewart.)

A. There is an effort to do that by the use of heparin and dicumerin and certain post-operative exercise; the use of the legs, sitting up in bed and so forth, but none are very effective.

Q. Doctor, you have read the hospital record as a part of the deposition of Doctor Call, which is marked as exhibit "A"?

A. Yes, I have.

Q. From an examination of that record can you tell us what it shows with reference to the diagnosis of the cause of Mr. Wilson's death?

A. I would say that it is not clear from the record here that the patient dies from pulmonary embolism, but rather that he had a progressive heart failure as indicated by the irregular pulse and the type of respiration which resembles Cheyne-Stokes respiration.

Q. Just explain to us the symptomology as indicated by this report. [132]

A. Well, the symptomology is that there was a slight increase in temperature, diaphoresis,—that is sweating; irregular pulse and the Cheyne-Stokes type of respiration would point more to progressive heart failure. The ordinary symptoms of pulmonary embolus are pain in the chest, some coughing and small amount of blood frequently, with difficulty of breathing and secondary heart failure.

Q. Now, Doctor, in a clean surgical case where the operation was skilfully performed without incident, tell us the percentage of deaths,—of all post-

(Testimony of James L. Stewart.)

operative deaths, that are due to pulmonary embolism.

A. Well, I don't know the exact percentage, but I would say it is very high, perhaps seventy or eighty.

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism.

Q. Going back to exhibit "A," can you tell us whether in your opinion the reference to a heart condition during the last six or seven hours before death indicated a weakness of the heart muscles or pulmonary embolism?

A. I should say it indicated a weakness of the heart muscle.

Q. Where there is a weakness of the heart muscle, is there also a natural consequence from surgical procedure that might result in death without a pulmonary embolism? [133]

A. Yes, sir.

Q. State what happens.

A. The condition of secondary shock might occur due to the general condition of the patient.

Q. And his heart would not stand the shock of the surgery?

A. That is right; yes, I might say that.

Q. Now, Doctor, in view of the hospital record, in your opinion, could the cause of his death be correctly diagnosed without an autopsy?

(Testimony of James L. Stewart.)

A. No.

Q. Assuming that Mr. Wilson was sixty-one years of age at the time of death, what would you say as to whether post-operative pulmonary embolism would be more probable and expected in his case than in that of a younger person?

A. No, I don't think so, because it occurs in all ages.

Q. Assuming, Doctor, that Harry H. Wilson was afflicted with a hernia and that he was operated on for this hernia at about eight o'clock or nine o'clock a.m., April 7, 1947, and that he died a little before five o'clock a.m. April 8, 1947, from pulmonary embolism or coronary embolism, would hernia and the treatment therefor be a contributing cause to his death?

A. Yes, sir.

Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause [134] to his death, if he had died from other causes?

A. Yes, sir, it would.

Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be in and of itself a contributing cause to his death?

A. Yes, sir.

Q. Is embolism a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence where no inter-

(Testimony of James L. Stewart.)

vening factor takes place such as infection or unskillful procedure? A. Yes, it occurs.

Q. Doctor, having considered the testimony of Doctor Call, and the hospital record as shown by exhibit "A", state whether the death of Harry H. Wilson was caused wholly or partly, or the result contributed to by the existence of the hernia and the treatment therefor?

A. Yes, it was.

Mr. Eberle: I think that is all, thank you, Doctor. The defendant rests.

Mr. Davis: No rebuttal. [135]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the duly qualified and appointed official Court Reporter of the United States District Court for the District of Idaho; that I reported in shorthand the evidence and proceedings had in and about the trial of the above-entitled cause, and thereafter transcribed in longhand (typewriting) the same, and that the foregoing transcript is a true and correct transcript of the testimony given and the proceedings had in and about the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 16th day of August, 1948.

/s/ G. C. VAUGHAN,
Official Reporter.

[Endorsed]: Filed August 19, 1948.

[Endorsed]: No. 12227. United States Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Cecelia J. Wilson, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed April 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12227

CECELIA J. WILSON,

Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant, having heretofore filed its Statement of Points and Designation of Record on appeal, specifying the complete record and all proceedings and evidence to be contained in the record on appeal, which Statement of Points and Designation are specified to be included in the record on appeal,

the points set forth in such statement of points appearing in such transcript are hereby adopted by appellant as its points on appeal and the complete record and all proceedings in evidence, as certified to the Clerk of the above-entitled Court, is hereby designated for printing in its entirety.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 25, 1949. Paul P. O'Brien, Clerk.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

CECELIA J. WILSON,

Respondent.

BRIEF OF APPELLANT

*On Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

HON. CHASE A. CLARK, *Judge*

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN
T. H. EBERLE,
Boise, Idaho,
Attorneys for Appellant.

FILED

Filed.....

JUN 20 1949

.....Clerk

PAUL P. O'BRIEN,

CLERK

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

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vs.

CECELIA J. WILSON,

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BRIEF OF APPELLANT

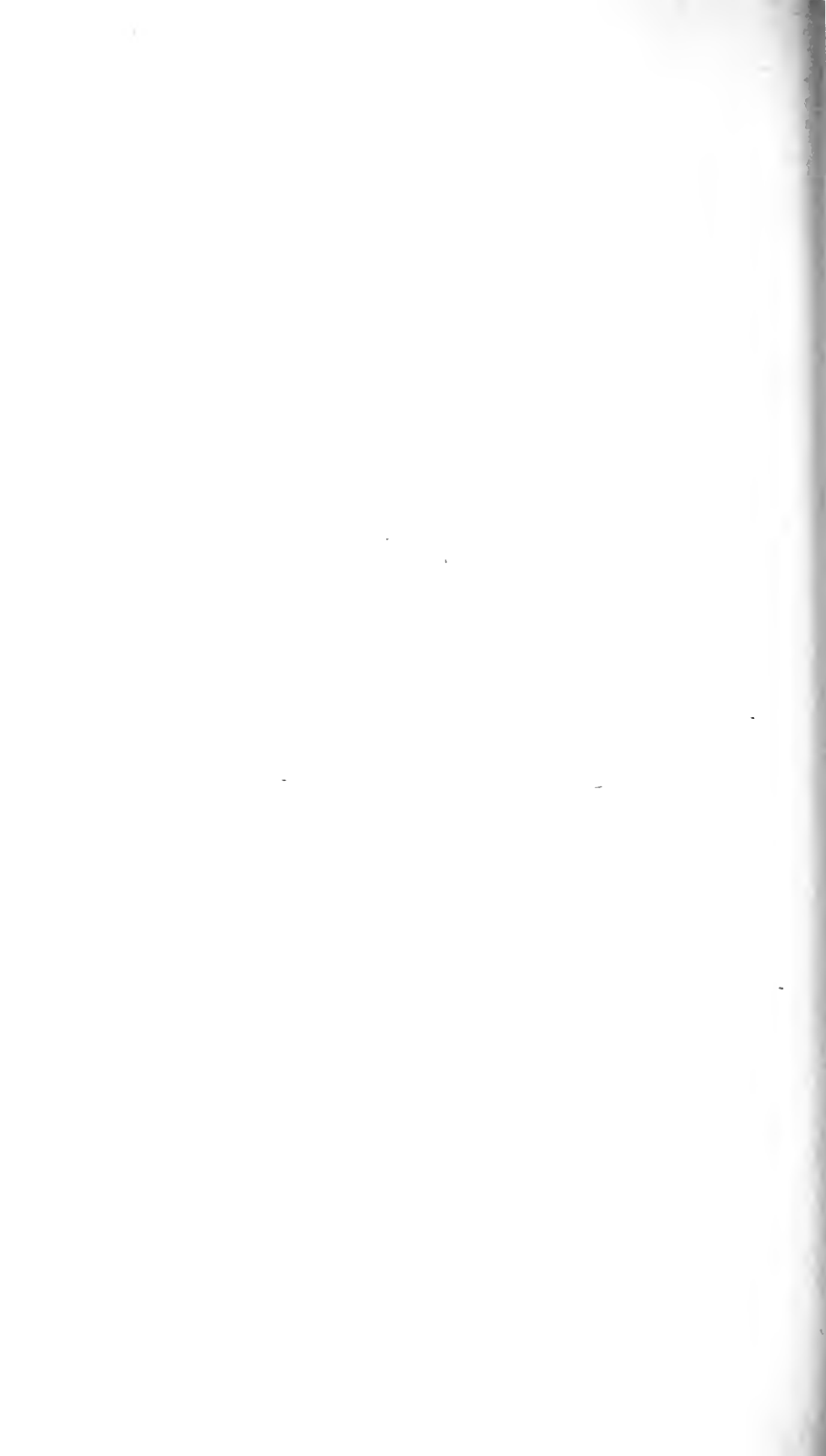
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Filed

.....*Clerk*



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IN THE
United States
Circuit Court of Appeals
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NEW YORK LIFE INSURANCE COMPANY,
a Corporation,
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vs.

CECELIA J. WILSON,
Respondent.

BRIEF OF APPELLANT

*On Appeal from the United States District Court
for the District of Idaho, Eastern Division.*

JURISDICTION AND PROCEEDINGS BELOW

This is an appeal from a judgment (T. 23) in favor of Respondent Cecelia J. Wilson and against Appellant New York Life Insurance Company for the sum of \$5,553.33, plus \$21.60 costs, dated March 21, 1949.

Action was commenced November 7, 1947, by complaint (T. 2) by respondent, a citizen of Idaho, against appellant, a New York corporation, to recover an additional \$5,000 under the double

indemnity clause of the policy issued by appellant upon the life of respondent's husband, Harry H. Wilson, by reason of his death, allegedly caused by accidental means. Answer was filed January 31, 1948 (T. 5), and amended (T. 7-10) and after a trial by the Court, without a jury, the Court delivered opinion (T. 11-18) and thereafter made findings of fact and conclusions of law (T. 19-22) followed by judgment March 21, 1949 (T. 23-24).

Notice of appeal and supersedeas bond were filed March 28, 1948 (T. 24-25); statement of points and designation of record made March 28, 1949 (T. 28-33), and adopted April 25, 1949 (T. 175).

The statutory provision sustaining jurisdiction is Section 1291, Ch. 83, Title 28, U.S.C.

STATEMENT OF THE CASE

Appellant, New York Life Insurance Company, issued policy No. 10255251 (T. 39) dated May 19, 1928, insuring the life of Harry H. Wilson in the sum of \$5,000.00, with respondent, Cecelia J. Wilson as beneficiary. For an additional quarterly premium of \$1.35 there was included in said policy a double indemnity provision as follows:

"DOUBLE INDEMNITY

"The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the insured resulted directly and independently of all other causes

from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

“Double Indemnity shall not be payable if the insured’s death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

“Double Indemnity shall not apply to the temporary insurance or to the paid-up insurance provided herein under ‘Surrender Values,’ or to any dividend additions provided under ‘Participation in Surplus-Dividends’ ” (T. 40).

The insured died on April 8, 1947 (T. 58). Appellant promptly paid to respondent the face amount of said policy in the sum of \$5,000.00, but upon claim being made by respondent for additional sum of \$5,000.00 under such double indemnity

clause, appellant denied liability therefor, and this action was commenced.

Insured had been operated upon for a bowel obstruction in 1940 (T. 52); again in 1943 for a hernia at Mayo's (T. 52-3). On April 6, 1947, he was again operated upon for a recurrent inguinal hernia (T. 53). This operation was advised by his doctor, respondent's principal witness in this case, Dr. O. F. Call (T. 79), who said there was a need for it (T. 103), at which time insured was 61 years of age (T. 53). The operation was at about 8:00 o'clock April 7, and insured died about 5:00 o'clock a.m., April 8, 1947 (T. 58).

Insured was given sedatives, the usual and ordinary procedure, to relax and induce sleep. Dr. Call, the attending physician, had been insured's doctor for many years (T. 62) and well knew of all previous operations as well as his personal habits, including that of snoring (T. 62-63). When the nurse reported loud, continuous snoring, she was assured that snoring was a common thing with insured, that he always snored (T. 63), if relaxed or asleep (T. 79-81).

The doctor also knew where there were former operations, clots occurred in lots of people (T. 83). When patient relaxed and slept, phlegm would gather as ordinary and usual result; proper procedure was coughing, which was encouraged to bring up phlegm (T. 99, 134, 145); nothing unusual in any such procedure.

Insured died within about twenty hours following the hernia operation. Respondent, however, con-

tended at the trial, and the Court found (T. 20-VI) that "he did not die as a result of hernia operation" but as a result of the sedative in connection with the operation. The insured snored and coughed, resulting in an embolism, causing his death (T. 20-21).

No allergy or hypersusceptibility to sedatives was shown; all parties were aware that insured was a pronounced snorer; the sedatives relaxed insured and induced sleep; when sleeping insured always snored; when asleep, phlegm gathers in the trachea of any patient; coughing is encouraged to prevent pulmonary congestion in any case. Trial theory, adopted by the trial Court, was that such coughing resulting from sleeping induced by a sedative, causing the breaking loose of an embolus, was accidental, although everything that occurred was normal, foreseeable and usual, and death would not have ensued had insured been free from the bodily infirmity of a thrombus or blood clot, which was liable to break loose at any time under any conditions.

Doctors Stewart, Graves, Beaman, Swindell and Pittenger testified that death resulting from post-operative embolism was foreseeable, not unexpected and not accidental (T. 142, 156-157-158, 162-163, 170). Immediately after death of insured, Dr. Call executed a death certificate which as required to include direct and contributing causes, but Dr. Call did not indicate accidental death by reason of sedatives, snoring and coughing, to which he testified a year later (T. 86).

All medical witnesses agreed that the existence of a thrombus in the insured was a bodily infirmity or venous disease (T. 88 to 90, 107, 136-137, 151).

From 50% to 80% of all post-operative deaths are due to emboli. Insured and his doctor knew of the prior operations of insured, his physical condition and snoring habits. Insured's actions during and after the operation were the same as in ordinary life (T. 115). Even a slight cough, either in or out of the hospital, might have caused his death, due to existing bodily infirmity. There was no bodily injury effected through external, violent or accidental means, and death resulting under the circumstances was not independent of all other causes, but was manifestly contributed to, and caused by, insured's bodily infirmity and disease.

SPECIFICATION OF ERRORS

1. The Court erred in its opinion and finding (No. III, T. 20) that Harry H. Wilson died by accident or by accidental death and that such death resulted directly or indirectly of all other causes from bodily injury effected solely through external, violent and accidental means.

2. The Court erred in its opinion and finding (No. XII, T. 21) that Harry H. Wilson's death was not contributed to, or caused directly or indirectly from infirmity of body or disease, the testimony being uncontradicted showing existence of such infirmity or disease and that the same was the cause of death.

3. The Court erred in its opinion and finding (No. VII, T. 20) that Harry H. Wilson's death was caused by choking or coughing or snoring and in finding (No. VIII, T. 21) that sedatives caused the same which accidentally caused his death, and finding (No. IX, T. 21) that such snoring and coughing was not to have been foreseen and entirely beyond the experience of the attending physician, the record showing that said Harry H. Wilson had previous operations and that such snoring and coughing were no different than ordinary, and his physical condition and habits were fully known to such attending physician.

4. That the Court erred in its opinion and in its finding (No. X, T. 21) that the sedative caused violent choking, snoring or coughing, tragically out of proportion to the cause and was accidental, the record being uncontradicted and showing that such snoring, coughing and choking was normal, usual, and not disproportionate, not caused by the sedative, but normal when sleeping or relaxed, and well known to the attending physician.

5. The Court erred in failing and declining to find and hold, in accordance with the evidence, as follows:

(a) In not finding and holding that there was nothing unexpected in the snoring and coughing of Harry H. Wilson, that the same was not unusual or unforeseen, that the sedative merely produced relaxation and sleep as intended, caused no injury, and there was no uncommon or unusual reaction by reason of any allergy, hypersusceptibility, or any

other cause, that such sedative did not cause snoring, but only induced sleep, and when said Harry H. Wilson slept he always had certain snoring habits which, during and subsequent to the operation, were no different than ordinary life.

(b) In not finding and holding that the insured had an existing diseased venous system and bodily infirmity which contributed to and caused death, and that the attending physician had full knowledge of the same.

(c) In not finding and holding that post-operative pulmonary embolism is foreseeable, expected and anticipated and the natural and probable result of surgical procedure, particularly in the case of Harry H. Wilson.

6. The Court erred in concluding (Conclusion No. I, T. 22) that the death of Harry H. Wilson was accidental within the terms of the policy referred to in respondent's complaint and that appellant failed to establish death within the exclusions of said policy (Conc. II, T. 22), such conclusions being contrary to the evidence which clearly showed that respondent did not prove insured received bodily injury effected solely through accident, that such injury was a direct cause of death, independently of all other causes, and that the same was not the result, directly or indirectly, from infirmity of body or disease.

7. The Court erred in entering judgment (T. 23) in favor of respondent and against appellant in the sum of \$5,553.33, plus costs of \$21.20, under date of March 21, 1949.

POINTS AND AUTHORITIES

Death is not an accident, and although in most instances unexpected, to hold that all unexpected deaths are accidental and the insurer liable would put into a policy an intent never conceived by the parties to the same.

Hodges et al vs. Mut. Benefit Health and Acc. Assn. of Amer., 131 P. (2d) 937 (Wash.) ;

Wade vs. Pacific Coast Elevator Co., 64 Idaho 176, 129 Pac. (2d) 894.

The death certificate required by law to include cause of death, course of disease or sequence of causes resulting in death, giving primary and contributory causes and duration, is evidence of the facts therein stated and not rebutted by opinion of maker of such certificate a year later in action to recover for personal friend.

Sec. 39-207 Idaho Code;

Sec. 39-227 Idaho Code;

Hillman vs. Utah Power & Light Co., 56 Ida. 67, 51 P. (2) 730.

To recover, respondent must prove that insured's death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and was not caused directly or indirectly by bodily infirmity or disease.

- Rodia vs. Metropolitan Life Ins. Co. (Pa.),
47 A. (2) 152;
Kellner vs. Travelers Ins. Co. (Cal.), 181
P. 61;
Hutchison vs. Aetna Life Ins. Co., 189 Pac.
(Ore.) 586;
Russell vs. Glens Falls Indemnity Co., 279
N.W. 287 (Neb.);
U.S. Mutual Accid. Assn. vs. Barry, 9 Sup.
Ct. 755.

Where, at the time of a hernia operation, both patient and doctor knew patient had prior operations and as residue from any such operations lots of people had thrombi or blot clots, patient was heavy snorer when asleep or relaxed, that as proper procedure in such hernia operation sedatives were given to relax and induce sleep, resulting in draining of phlegm and coughing to remove the same, both of which were ordinary and usual procedure, action of patient during and subsequent to such hernia operation being the same as in ordinary life and known to patient and doctor, and even a light cough sufficient to loosen thrombus or blot clot, a pulmonary embolism following such hernia operation was not an accident or accidental and caused solely by bodily injury through accident.

- Order of United Commercial Travelers vs.
Nicholson, 9 F. (2) 7;
Russell vs. Glens Falls Indemnity Co., 279
N.W. 287 (Neb.);

- Schroeder vs. Police and Firemens Ins. Assn.
(Ill.) 21 N.E. (2d) 16;
- New Amsterdam Gas Co. vs. Cora Belle
Johnson (Ohio), 110 N.E. 475;
- Aetna Life Ins. Co. vs. Tynan, 255 F. 483;
- Amer. Nat. Insurance Co. vs. Briggs (Tex.),
90 S.W. (2d) 602;
- Binder vs. Nat'l Masonic Acc. Assn. (Iowa),
102 N.W. 190;
- Herthel vs. Time Ins. Co. (Wis.), 265 N.W.
575;
- Hodges et al vs. Mut. Benefit Health and
Acc. Assn. of Amer., 131 P. (2d) 937
(Wash.);
- Howe vs. Nat'l Life Ins. Co. (Mass.), 72
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- Hutchison vs. Aetna Life Ins. Co., 189 Pac.
(Ore.) 586;
- Kellner vs. Travelers Ins. Co. (Cal.), 181 P.
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- Kundiger vs. Metrolopitan Life Ins. Co.
(Minn.), 15 N.W. (2d) 487;
- Maryland Casualty Co. vs. Morrow, 213 F.
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- Michener vs. Fidelity & Cas. Co. of N.Y.
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- Mutual Benefit vs. Webber (Ky.), 187 S.W.
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- National Assn. of Ry. Clerks vs. Scott, 155
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- Preston vs. Aetna Life Ins. Co. (Ill.), 77 F.
Supp. 743;

- Ryan vs. Continental Casualty Co., 47 F.
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Smith vs. Federal Life Insurance Co., 6 F.
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Stewart vs. Travelers Protective Assn.
(Tex.), 81 F. (2d) 25;
U.S. Mutual Accid. Assn. vs. Barry, 9 Sup.
Ct. 755;
Wade vs. Pacific Coast Elevator Co., 64
Idaho 176, 129 Pac. (2d) 894;
White vs. Standard Life & Accid. Ins. Co.
(Minn.), 103 N.W. 735.

ARGUMENT

THE BREAKING AWAY OF A THROMBUS OR BLOOD CLOT DURING OR FOLLOWING A SEDATIVE AND SURGERY PERFORMED IN ACCORDANCE WITH USUAL AND ORDINARY PROCEDURE UNDER CONDITIONS WELL KNOWN TO ALL PARTIES IS NOT AN ACCIDENT, AND DEATH RESULTING THEREFROM WAS NOT DIRECTLY AND INDIRECTLY OF ALL OTHER CAUSES FROM BODILY INJURY THROUGH EXTERNAL VIOLENT AND ACCIDENTAL MEANS.

Respondent contended, and the Court found, that the insured died of accident, or by accidental death (T. 20, F. III), that the sedative was externally administered (T. 21, F. XI), that such sedative caused coughing, choking and snoring, unexpectedly and accidentally causing the death of the insured

(T. 21, F. VIII), and that such snoring and choking was not foreseen and beyond the experience of his attending physician (T. 21, F. IX).

These findings are not supported by the evidence. The fact is that the sedative used was the usual, ordinary and regular procedure. The effect upon the insured was the ordinary and usual effect of such a sedative and the one intended. The administering of the sedative was not an external or violent injury; it caused the insured no bodily injury. The sedative was given to allay pain, relax the body, and induce sleep and rest. This was the precise effect that it had upon the insured. There is no evidence that the sedative had any other effect. There was no uncommon or unusual reaction to the drug by reason of any allergy or hypersusceptibility to the sedative itself.

The sedative did not cause the snoring; it did nothing other than to induce sleep. The insured always snored when he slept and this fact was well known to the attending physician, respondent's chief witness, a friend and doctor of the insured for twenty years.

The nurse reported loud, continuous snoring, and Dr. Call testified:

A. Yes, sir, there is, the nurse made several reports of loud continuous snoring, more than she had heard in other cases and she was assured—

Q. What was that, Doctor?

A. She was assured that was a common thing with Mr. Wilson, that he always snored (T. 63).

Although Dr. Call made some general statements and expressed opinions upon direct examination which the Court mentioned in its opinion, the doctor was quite specific, upon cross-examination, that the insured and his doctor were well aware of the conditions involved. The doctor testified:

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?

A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated?

A. Natural snoring (T. 97).

* * * * *

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post operative procedure?

A. In varying degrees. Some snore and others won't particularly those who snore anyway, they will snore (T. 97-8).

* * * * *

Q. His action during this operation and subsequent was no different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in this hospital?

A. He was quite a snorer in an operation or not in an operation (T. 115).

Thus it is clear from the evidence that the opiate did not cause any injury to the decedent and further than the snoring was unconnected with such opiate and was a natural and known tendency of the decedent while sleeping.

It is also clear from the evidence that the cough of the decedent was not caused by the opiate but was a natural consequence of the gathering of phlegm in the respiratory tract after the operation.

Q. The mucus and secretion that get down in the trachea due to the relaxation from the opiate?

A. Not that—it was mucus in the respiratory tract.

Q. Yes, and you clear that out—naturally you clear your throat when that gets down in the throat?

A. If you are not asleep.

Q. When you are asleep the natural tendency is to drain down?

A. The tendency is the same whether he is given an opiate or not. A snorer does the same thing without an opiate.

Q. In ordinary life he would do it without an opiate?

A. That's right (T. 115).

All of the doctors testified that the coughing was due to the phlegm or mucus which drained down the trachea and that there was nothing unusual or unexpected in such draining because it is a common

post-operative occurrence. Moreover, Dr. Call testified:

Q. And heavy snoring doesn't make any difference to the amount of mucus going down the trachea?

A. That is right (T. 99).

There is no dispute among the witnesses as to the proper procedure for clearing such phlegm or mucus. In other words, patients are encouraged to cough. As Dr. Brothers said: "It is good procedure to require and to cause the patient to cough up the phlegm" (T. 134). Hence, there was nothing unusual or unexpected in occurrence of the phlegm, nor in the coughing as a part of the post-operative procedure.

Dr. Call had performed one of the prior operations and knew of the other operations of the insured. He knew that under such conditions a thrombus or blood clot might well have formed. He said:

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people (T. 83).

He and his associate, Dr. Brothers, knew that even a rather light cough might break such thrombus loose (T. 130).

In other words, as shown by the death certificate, there was nothing unusual or unexpected in this case. Both the doctor and the insured were aware of the fact that he was a pronounced snorer when he slept. The sedative was given to relax and induce

sleeping. The coughing was proper procedure and encouraged to avoid pulmonary congestion. With the existence of the bodily infirmity of a thrombus or blood clot, even a light cough anywhere could have caused death. The doctor, knowing of the prior operations and that lots of people, as he stated, had such infirmities as a result thereof, the actual occurrence of the breaking loose of such thrombus was as foreseeable as the fact that he would snore when he slept. The only act that was unexpected was death itself. This, however, is not the basis for any recovery in this case. As was said in the recent Washington case of *Hodges et al vs. Mutual Ben. Health and Accident Assn. of America*, reported in 131 P. (2d) 937:

“True, death is in most instances unexpected, but to hold that all unexpected deaths are accidental and that insurance companies which insure against accidental death are liable on that ground would amount to a re-writing of such policies by the courts and put into each of those policies an intent that was never conceived by either the company or the insured at the time the policies were written. That, the courts cannot do. Courts may only determine the legal effect of contracts.”

POST-OPERATIVE PULMONARY EMBOLISM IS NOT ACCIDENTAL AND DEATH RESULTING THEREFROM IS NOT DIRECTLY AND INDEPENDENTLY OF ALL OTHER

CAUSED FROM BODILY INJURY THROUGH
EXTERNAL, VIOLENT AND ACCIDENTAL
MEANS.

As stated in the case of *Bennett vs. Equitable Life Assurance Society*, 25 N.Y.S. (2) 799 (1939):

“Here, however, death ensued as the result of post-operative pulmonary embolism. In such event, the cause was neither trivial nor the result unforeseen.”

Although Dr. Call, respondent's principal witness, was quite positive on the stand that death, resulting from a pulmonary embolism, was accidental, it will be noted elsewhere in this brief that following the death, a year prior to his testimony, he was not certain that an embolism could be classed an accident (T. 102, 100).

Even Dr. Brothers, respondent's other witness, admitted that Dr. Call well knew the existence of the hazards and consequences involved when he operated upon insured, he testified:

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time?

A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery,

but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true (T. 130).

Five other doctors testified as experts. They are the leaders in their respective fields in Idaho; internal medicine, surgery and pathology. Dr. Beeman, pathologist with a wide experience in the northwest, testified:

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation of blood may in itself cause

venous thrombus with resultant pulmonary embolism (T. 156).

Dr. Swindell, internist, said:

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the case of every post-operative patient.

Q. Including operations for hernia?

A. Yes, sir, including operations for hernia (T. 162).

Q. In your opinion is a post-operative pulmonary embolism accidental?

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post-operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post-operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is (T. 163).

He also testified:

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls (T. 164).

Dr. Pittenger, surgeon, testified:

Q. In your opinion, Doctor, is a pulmonary embolism accidental, is it an accident?

A. In my opinion it is not.

* * * *

Q. It is reasonably expectable?

A. Yes, sir (T. 166).

* * * *

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct (T. 167).

* * * *

Q. Would you say under those facts the pulmonary embolism was probable and to be anticipated and expected?

A. It was to be anticipated.

Q. And expected?

A. Yes, and expected (T. 167).

* * * *

Q. And post-operative pulmonary embolism is reasonable foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post-operative pulmonary embolism is an accident what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true?

A. I don't believe it is true (T. 169).

Dr. Stewart, surgeon, testified:

Q. Post-operative pulmonary embolism is something that is (131) reasonable foreseeable?

A. Yes, sir, it is foreseeable (T. 170).

It is interesting to note the percentage of post-operative deaths due to embolisms.

Dr. Graves, surgeon, testified:

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from pulmonary embolism in hernia operations?

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade (98).

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group?

A. Yes (T. 143).

Dr. Pittenger testified:

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct.

*

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*

Dr. Stewart testified that as high as 80% of post-operative deaths were due to pulmonary or cerebral embolisms, saying:

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism (T. 172).

A DEATH CERTIFICATE UNDER THE LAWS OF IDAHO IS EVIDENCE IN ALL COURTS OF THE FACTS THEREIN STATED, AND IS NOT REBUTTED BY OPINION OF MAKER THEREOF EXPRESSED A YEAR LATER.

Sec. 39-207, Idaho Code, provides that the certificate of death shall contain, among other items, the following:

“The cause of death, so as to show the course of disease or sequence of causes resulting in death, giving primary cause, and also the contributing causes, if any, and the duration of each.”

Sec. 39-227, Idaho Code, provides that such certificate shall be prima facie evidence in all courts and places of the facts therein stated.

The Supreme Court of Idaho in the case of Hillman vs. Utah Power & Light Company, 56 Ida. 67, 51 P. (2) 730, the Court held such certificate evidence for the purpose enumerated in the statute.

It will be noted that the findings are based principally upon the testimony of Dr. Call, the main witness for respondent. He testified, and the Court found, that the insured did not die as a result of a hernia operation (T. 20, F. VI), but that death was caused by choking and snoring, resulting in an embolism (T. 20, F. VII) and that the same was accidental. This doctor's medical report, made about

a year prior thereto, in answer to the question as to whether the death was accidental, answered "Yes, providing embolism is classed as an accident" (T. 100).

This same doctor executed the death certificate also about a year prior to his testimony. He first stated that the immediate cause of death was pulmonary embolism and that its duration was sudden. Then he stated that death was due to herniorrhaphy (repair of hernia), duration, 24 hours (T. 102). Dr. Call was a practitioner of 28 years' experience (T. 62). He knew the statutory requirement and the form provided for showing the course of disease or sequence of causes resulting in death, including primary and contributing causes and duration. Dr. Call made no reference to the snoring, coughing or sedative, which he a year later testified were the cause of death. We do not believe under the circumstances he can impeach or rebutt his certificate by such opinion given a year later in the trial of a cause for the recovery of additional insurance in behalf of his close friend (T. 62).

TO RECOVER, RESPONDENT MUST PROVE, AND DID NOT, THAT INSURED'S DEATH RESULTED, DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES, FROM BODILY INJURY EFFECTED SOLELY THROUGH EXTERNAL, VIOLENT AND ACCIDENTAL MEANS AND WAS NOT CAUSED DIRECTLY OR INDIRECTLY, WHOLLY OR PARTLY, BY BODILY INFIRMITY OR DISEASE.

The fact that insured had a pre-existing bodily infirmity or disease is uncontradicted. Even upon respondent's theory of the case, such infirmity or disease was a contributing factor and cause of death. It will be noted that although these facts are established by respondent's witnesses, the trial Court did not even discuss the same in its opinion. Clearly the Court erred in its finding (T. 21-XII) that such infirmity was not, directly or indirectly a cause of death and that death was accidental, independent of all other causes.

The only proof respondent offered was the testimony of her two doctors, Call and Brothers. As heretofore stated, Dr. Call's testimony was that the insured had a thrombus or blood clot, a residue of one of his prior operations and that the same broke loose and caused his death. He stated that such thrombus was a pre-existing condition (T. 88). He then testified as to such condition of the venous system:

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so, Doctor?

A. If you have a diseased venous system you can expect untoward results.

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That is right (T. 90).

This bodily infirmity or disease, Dr. Call then testified, was the cause of insured's death:

Q. If there was any clot that resulted in the embolism, it was certainly due to some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we could term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir (T. 106-107).

Dr. Brothers, the only other witness, produced by respondent, likewise testified that the existence of such thrombus was a pre-existing bodily infirmity (T. 136). He also testified that such pre-existing infirmity, which reference to snoring and coughing, was the exciting cause:

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir (T. 129).

Dr. Graves, a surgeon, also testified that such thrombus, or blood clot, was a diseased process of the veins, and after explaining the reason for the same, said:

Q. Can this be designated as a disease process of the veins?

A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure?

A. Yes, sir (T. 149).

Dr. Beeman, a pathologist, also testified to the diseased condition of the venous system: "In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated" (T. 158).

There is no testimony in the record contrary to that of the doctors to the effect that there was a pre-existing bodily infirmity or venous disease and that the same contributed to and was a cause of death. Respondent contended, and the trial Court found, that such pre-existing condition and venous disease resulted in an embolism, causing death. In *Hutchison vs. Aetna Life Insurance Company*, 189 Pac. (Ore.) 586, the rule is stated:

"To recover death benefit under group accidental death and dismemberment policy, beneficiary must prove that death resulted, directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, and was not

caused directly or indirectly, wholly or partly, by bodily or mental infirmity."

The sedative administered was proper procedure in order to ease pain, cause relaxation, and induce sleep and rest. The effect upon the insured was precisely that intended. The sedative did not cause snoring, it induced sleep, and, as Dr. Call said: "I know that he always snored when he slept" (T. 81). This was no different than in ordinary life. Dr. Call testified that "a snorer does the same thing without an opiate" (T. 115). He then testified that insured's actions during the operation and subsequent were no different than in ordinary life (T. 115). The existence of a blood clot, due to prior operations, is not uncommon. Dr. Call testified:

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction.

He had this thrombus, it happens in lots of people (T. 83). Such a condition is a disease of the venous system, as pointed out by the doctors as hereinbefore mentioned. With such an infirmity, Dr. Call testified:

Q. If he coughed on the street the same thing could have happened?

A. It could have happened, where there is a pre-existing thrombus (43).

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema (T. 95).

Manifestly, where the experts all agree that the pre-existing condition in the case at bar was a bodily infirmity or a venous disease, death under the circumstances was not independent of other causes, but was certainly contributed to, and caused by, such infirmity or disease. In the case of *Smith vs. Federal Life Insurance Company*, 6 F. 283, it is held:

“Where insured at the time he received an injury is suffering from a disease or defect which, acting with the injury as a contributing factor, causes death, or when such disease or defect aggravates the effect of the disease, and both acting together cause death, the injury is not the sole cause of death, and the death is not within the terms of a policy insuring against death effected directly and independently of all other causes through external, violent and accidental means.”

To the same effect it will be noted from the testimony of Dr. Call that he seemed to be under the impression that perhaps death itself was accidental. The Supreme Court of Idaho, in the case of *Wade vs. Pacific Coast Elevator Co.*, 64 Idaho 176, 129 P. (2) 894, held that “death is not in itself an accident.”

Clearly the burden was upon respondent to establish that death was not only caused solely by acci-

dent, but also that there was no pre-existing infirmity which may have been a contributing factor, directly or indirectly causing death. *Rodia vs. Metropolitan Life Insurance Co.*, (Pa.) 47 A. (2) 152, is a case where the policy provided inter alia for insurance "against the results of bodily injury * * *" caused directly and independently of all other causes by violent and accidental means, and that said insurance should not cover "accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly by disease or mental infirmity * * *". On page 153 the Court says:

"Where the liability of the insurance carrier is restricted as in the policy here in controversy, it is well settled in this commonwealth that it is insufficient for plaintiff merely to show a direct causal relation between the accident and the disability or death. The burden is on her to establish the death was caused solely by external and accidental means (citing authorities). If the proof points to a pre-existing infirmity which may have been a contributing factor, plaintiff must also produce evidence to exclude the possibility" (citing authorities).

In the case of *Ryan vs. Continental Casualty Co.*, 47 F. (2) 472, it is held:

"Burden was on plaintiff in an action on

accident policy to prove that insured's death resulted solely from accident."

In *Kellner vs. Travelers Insurance Co.*, (Cal.) 181 P. 61, it is held:

"In an action on an accident policy under which insurer was not responsible for the result of injuries resulting wholly or partly from disease in any form, the absence of disease contributing to death was as much part of the plaintiff's case as an affirmative showing of the occurrence of an act producing injury and of death following such injury, although insurer alleged in its answer that deceased was at the time of the accident in a diseased condition and that the disease proximately contributed to his death."

In *Order of United Commercial Travelers vs. Nicholson*, 9 F. (2) 7, it is held,

"Under fraternal benefit contract insuring against death by accidental means independent of other causes and not contributed to by disease, burden was on plaintiffs to prove by preponderance of evidence that member's death resulted solely from accident not contributed to by disease in any degree."

The cases involving the phraseology now under consideration are numerous and the results are

varied and contradictory. A part of this confusion is the result of failure to distinguish in drawing analogy between cases involving policies which contain only the provision "resulting, directly, independently of all other causes from bodily injury effected solely through external, violent and accidental means" and those policies which in addition contain the provision excepting from coverage, accidents where death results . . .; or directly or indirectly, from infirmity of mind or body, from illness or disease . . ."

The difference in cases under these two types of policies is very ably summarized in the Nebraska case of *Russell vs. Glens Falls Indemnity Co.*, 279 N.W. 287, in the following passage:

"Defendant requested the following instruction: 'You are instructed that the plaintiff in his petition alleges that the accident in question resulted in total deafness causing total disability during the period sued on. Now you are instructed that if you believe that the deafness which the plaintiff suffered after the accident was caused both by the accident and the diseased condition of plaintiff's ears, and that the diseased condition of plaintiff's ears at the time of the accident directly and indirectly, or wholly or partly, caused such total disability, as claimed by plaintiff then your verdict should be for the defendant.'

"The decisions on the question set out in other jurisdictions are not uniform and are

inharmonious and in conflict, and we find by examination of the many cases cited in the briefs that any attempted reconciliation of them is hopeless and would result in absurd distinctions. In this state there is not a clearly defined rule under the previous decisions of this court. One source of confusion in the decisions on this question in different courts, even in the same jurisdiction, is in applying the reasoning and law of one case, based on a certain insurance contract providing for benefits resulting from accident, to another case with a different contract . . .

“It seems reasonably clear that a policy with the phrase ‘resulting directly, independently and exclusively’ refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase ‘wholly or partly, directly or indirectly, from disease or mental or bodily infirmity’ refers to another contributory cause, whether proximate or remote. To illustrate: A person might be standing near a stone wall and become dizzy and fall and receive a serious injury. Clearly there is an accident. But if the dizziness was caused by an existing illness or disease of the insured, the illness or disease would be the remote or indirect cause of the injury. It would at least in part cause the injury. It would be a contributing and co-operating cause. But, whether a proximate or remote cause, if a contributing

cause, there can be no recovery where such a cause is excluded by the policy."

Wherever an existing disease or bodily infirmity has cooperated to produce the final result, it has been uniformly held that there could be no recovery where the policy contained the exception clause as well as the general clause. Further, the better and majority rule, where the policy contains only the coverage provision "directly and independently of all other causes from bodily injury effected solely through violent and accidental means," is follows:

"Where the insured at the time he received an injury is suffering from disease, bodily defects or infirmity which, acting with the injury as a contributing factor, brings about death, or when such existing disease, defect or infirmity aggravates the effect of the injury, or the injury aggravates the effects of the disease, and both, acting together, cause death, the injury is not the sole cause of death and there there is no liability."

The following is a partial list of the cases which support the above rule:

Preston vs. Aetna Life Ins. Co. (111), 77 F. Supp. 743;

Michener vs. Fid. & Cas. Co. of N.Y. (Iowa), 203 N.W. 14;

Smith vs. Fed Life Ins. Co., 6 F. (2d) 283;

Maryland Cas. Co. vs. Morrow, 213 F. 599;

Aetna Life Ins. Co. vs. Ryan, 255 F. 483;
Nat'l Assn. of Ry. Clerks vs. Scott, 155 F.
92;

White vs. Standard Life and Accid. Ins. Co.
(Minn.), 103 N.W. 735;

Binder vs. Natl. Masonic Acc. Assn. (Iowa),
102 N.W. 190;

U.S. Mut. Accid. Assn. vs. Barry, 9 Supp.
Ct. 755;

Mutual Ben. Health and Accid. Assn. vs.
Hite (Va.), 25 S.E. (2d) 743;

Mut. Ben. vs. Webber (Ky.) 187 S.W. (2d)
273;

Kundiger vs. Metro. Life Ins. Co. (Minn.),
15 N.W. (2d) 487;

Mut. Ben. Health and Accid. Assn. vs. Ryder
(Va.), 185 S.E. 895;

Hodges vs. Mut. Ben. Health and Accid
Assn. (Wash.), 131 P. (2d) 937;

Stewart vs. Travelers Prot. Assn. (Tex.),
81 F. (2d) 25;

Am. Nat. Ins. Co. vs. Briggs (Tex.), 90
S.W. (2d) 602;

Herthel vs. Time Ins. Co. (Wis.), 265 N.W.
575;

Howe vs. Nat'l Life Ins. Co. (Mass.), 72
N.E. (2d) 425.

It is clear that since the policy at hand contains the exception excluding death which results "directly or indirectly, from infirmity of mind or body, from illness or disease," that even though the

sedative was considered to have constituted an external injury, without the pre-existing thrombus death would not have resulted, and respondent cannot recover.

The manner in which the evidence was presented in an effort to establish liability in the present case is analogous to that in the Illinois case of *Schroeder vs. Police & Firemen's Ins. Co.*, *supra*, we quote from that opinion:

"A post mortem examination was held by Dr. Wheatley and Dr. Dunham, both of whom testified in the case. No cuts, bruises nor outward marks of trauma were found on the body. It was ascertained that his heart was apparently normal except for certain white calcium deposits in the upper portion thereof and in the arch of the aorta and a condition indicating arteriosclerosis, and the cause of his death was determined and reported by the physician to be angina pectoris. Upon direct examination, omitting the previous history of the case, medical testimony was given by Dr. Dunham and Dr. Wheatley in response to hypothetical questions that his death could have been caused by shock, over-exertion or excitement. On cross-examination, including the element of the previous attack of angina pectoris, both gave it as their opinion that he had died of angina pectoris. Further expert testimony was given by Dr. Robert S. McCaughey, who had examined an electro-cardiogram made on Schroeder

at the hospital in April, 1936. He testified that the cardiogram showed thrombosis and was a classical picture of blood clotting in the heart muscle, indicating angina pectoris. In answer to a hypothetical question, he stated that Schroeder had a degenerative heart circulation and that the condition might have contributed to his death. He also testified that physical exertion would likely produce death in a man who had angina pectoris.

“* * * In view of the undisputed facts appearing in the record in this case, we hold the finding of the jury was contrary to the evidence on the issues submitted. Under the facts and circumstances in evidence, we find and hold, upon a rehearing herein, that the death of William Schroeder, the insured, did not result from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means, and we find that his death was caused directly or indirectly, wholly or partly, by the disease or angina pectoris and the degenerative condition of his heart from which he was suffering and that the policy of insurance does not cover such loss.”

The Supreme Court of Ohio in the case of *New Amsterdam Casualty Co. vs. Cora Belle Johnson*, 110 N.E. 475 employed in summation of a problem before that Court, similar to the case at hand:

“In every moment of our conscious or sleeping hours we are all possible victims of errors of the human system, respiratory, circulatory, or digestive; errors that our physicians would term accidents of nature. Even the diseases which afflict humanity are frequently the result of accidents pure and simple. As has been expressively said, nature slips a cog and the well man is invalided. The separation of injuries occasioned by accidental means from those occasioned by means non-accidental is not free from difficulty, and an attempt to logically analyze every supposable case of this character and differentiate along consecutory lines would lead to some contradictions.

“While the views of the laity cannot in the very nature of things be the controlling gauge wherewith to measure doubtful legal propositions, yet it might be suggested that the average business man, were the question involved in this case submitted to him, would in all likelihood be surprised, if not shocked, to learn that it had been held that an injury of the character suffered by the defendant in error should be followed by the payment of indemnity by a strictly accident insurance company.

“The Court is constrained to hold that the result which followed the taking of the bath by the insured was not an accident upon which recovery can be had under the wording of the policy. A case is cited where recovery was had by reason of a ruptured blood vessel occasioned

by the mere lifting one's self naturally out of a chair. It is felt by this Court that in such case, as in the case at bar, such a conclusion would be unduly pressing the construction of the language universally employed in naked accident policies. It would amount to an unfair and unjust enlargement of the company's liability, and would convert accident companies into both sick-beneficial and life insurance companies; and, worse than this, the apparent vice of it is that, if countenanced, it would inevitably result in the necessity of requiring constantly increasing premiums from the vast multitude of the laboring classes as well as people of moderate means who chiefly buy this character of insurance."

As noted, Dr. Call testified for respondent that the bodily infirmity had existed for many years and was of a settled and determined character. In this he was corroborated by the testimony of doctors, some of whom referred to the infirmity as a venous disease. By her own case, respondent showed that death was not caused by bodily injury through accident, independently of all other causes, but that death was contributed to and caused by such infirmity or disease.

CONCLUSION

This action to recover \$5,000.00, in addition to the \$5,000.00 paid by appellant in the face amount of the policy, was brought under the double indemnity clause providing for payment only in the event of death resulting directly and independently of all other causes from bodily injury effected through external, violent and accidental means. No bodily injury was shown. The sedative was proper procedure; no untoward or unexpected results ensued; it allayed pain and induced rest and sleep as it was intended; when insured slept he always snored, which was well known to attending physician, however such sleep was induced. The bodily infirmity or disease of insured was of long settled and determined character. Such infirmity, a thrombus or blood clot, a diseased venous system, could be expected to break loose at any time, either by a slight cough, walking, or other ordinary actions of life, all of which were also known. In any event, a post-operative pulmonary or other embolism, is a hazard of every surgical procedure, the great scourge occurring in about 50% to 80% of all post-operative deaths, not unforeseen, improbable or unexpected. Not only did respondent not show that death resulted directly from bodily injury solely through accident, but the record affirmatively shows a pre-existing infirmity or disease which contributed to

and caused the death of insured. Judgment should therefore be reversed.

Respectfully submitted,

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APPENDIX "A"

Sec. 39-207, Idaho Code. CERTIFICATES OF DEATH.—The certificate of death shall contain the following items:

* * * * *

17. Cause of death, including the primary and contributory causes or complications, if any, and duration of each.

Sec. 39-227. CERTIFIED COPIES AND SEARCHES FOR BIRTH AND DEATH CERTIFICATES—USE AS EVIDENCE—FEES.—The department of public health shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under the provisions of this chapter, for the making and certifica-

tion of which it shall be entitled to a fee of fifty cents, to be paid by the applicant; and any such copy of the record of a birth or death, when properly certified by the department to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. * * *

No. 12,227

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

VS.

CECELIA J. WILSON,

Appellee.

**On Appeal from the United States District Court for the
District of Idaho, Eastern Division.**

Honorable Chase A. Clark, Judge.

BRIEF FOR APPELLEE.

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

VS.

CECELIA J. WILSON,

Appellee.

On Appeal from the United States District Court for the
District of Idaho, Eastern Division.

Honorable Chase A. Clark, Judge.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee has no disagreement or objection to the statement of the case as made by the appellant, which is found on pages 4 to 8 of the printed brief. However, the statement naturally is one based upon the assumption that the facts referred to therein as appearing in the record, support the appellant's theory

(Note): All numbers contained herein such as 94, refer to the number of the page of the printed transcript of record unless otherwise specifically stated.

and refers to facts that it believes should be accepted by the Court, and has not taken into consideration the direct conflict in the testimony by the different expert witnesses and does not refer to the testimony as quoted in the opinion of the Court, T-14-15, nor does it refer to the fact that the unexpected snoring, coughing and violent exertion was such that the deceased was swallowing his tongue, T-94.

The appellee pleaded the issuance of the policy in payment of the premiums and the death by accident. The burden was upon the appellee to establish these allegations.

SUMMARY.

The appellant having admitted the issuance of the Policy and having pleaded specially that the death of the deceased resulted in such a manner as to be within certain exclusions of the policy, T-10, the burden was upon appellant to establish that defense.

The issuance of the policy, the payment of premiums and the death of the deceased are not disputed. The case under the existing law is to be determined by the Appellate Court as to whether the Findings of Fact T-22, are supported by any evidence. If the Findings are supported and not clearly erroneous, the conclusions of law and judgment are naturally correct.

POINTS AND AUTHORITIES.

I.

Rule 52 as amended, of the Federal Rules of Civil Procedure, is applicable in this cause and the Appellate Court will not set aside Findings of Fact unless clearly erroneous. Such portion of Rule 52 of the Rules of Civil Procedure as is applicable herein is quoted as follows:

“(a) EFFECT. In all actions tried upon the facts without a jury OR WITH AN ADVISORY JURY, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*”

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2d) 876 (see C.C.A. 9);

Friedman v. Decatur Corporation, 77 App. (D.C.) 326, 135 Fed. (2d) 812;

Webb v. Frisch, 111 Fed. (2d) 887;

Durkey v. Arndt, 138 Fed. (2d) 317;

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McWilliams Transit Incorp. v. Henges Marine Ins., 130 Fed. (2d) 201;

- Reynolds v. Goodwin Hill Corporation*, 154 Fed. (2d) 553;
Blytheville Cotton Oil Co. v. Kurn, 155 Fed. (2d) 467;
U. S. v. Alum. Co. of Am., 148 Fed. (2d) 416;
Universal Pictures Co. Inc. v. Cummings, 150 Fed. (2d) 986 (C.C.A. 9);
Sapp v. Gardner, 143 Fed. (2d) 423 (C.C.A. 9);
Lowden et al. v. Hansen, 134 Fed. (2d) 348.

II.

The record showing a difference of opinion and a conflict between the different expert witnesses testifying on behalf of the parties, the trial Court had an opportunity to determine the credibility of the witnesses and the weight to be given to their testimony; the findings should not be disturbed if supported by any evidence.

- Rule 52 of *Rules of Civil Procedure*, as amended, *supra*;
Blytheville Cotton Oil Co. v. Kurn, 155 Fed. (2d) 467;
U. S. v. Alum. Co. of Am., 148 Fed. (2d) 416;
Woods v. Fliss, 168 Fed. (2d) 614 (and cases cited under Point I *supra*).

III.

The law of the cases is to be determined by the law and the statutes of the State of Idaho.

- Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 8 L.Ed. 1188, 114 A.L.R. 1487.

IV.

The death of the deceased was accidental.

Teeter et al. v. Dairymen's Coop. et al. (Ida.),
190 P. (2d) 687;

Rauert v. Loyal Prot. Ins. Co. (Ida.), 106 Pac.
(2d) 1015.

V.

The Idaho Courts have repeatedly held that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon the meaning of an accident policy, one of which will permit the insured to recover and the other not permitting such recovery, that the Courts must so construe the policy as to permit recovery. The Idaho Courts having so held, decisions from other Courts adopting this liberal construction are in point in the present controversy.

Rauert v. Loyal Protective Ins. Co. (Ida.), 106
Pac. (2d) 1015;

O'Neill v. N. Y. Life Ins. Co. (Ida.), 152 Pac.
(2d) 707;

Maryland Cas. Co. v. Boise Street Car. Co.
(Ida.), 11 Pac. (2d) 1090;

Kingsford v. Bus. Men's Assurance Co. (Ida.),
68 Pac. (2d) 58;

Sweaney & Smith et al. v. St. Paul Fire Ins. Co.
(Ida.), 206 Pac. 178;

Watkins v. Fed. Life (Ida.), 29 Pac. (2d) 1007;

Stout v. Continental Life Ins. Co. (Ida.), 291
Pac. 1073;

- Manufacturers Acc. Indem. Co. v. Dorgan*, 58 Fed. 945;
- Burr v. Com. Trav. Mut. Acc. Ass. Co.* (N.Y.), 67 N.E. (2d) 248, 166 A.L.R. 762 (exhaustive note is found in the discussion of this question at page 473 of 166 A.L.R.);
- Jensma v. Sun Life Ins. Co.*, 64 Fed. (2d) 457 (9th C.C.A.);
- Beile v. Trav. Prot. Ass. Co.* (Mo.), 135 S.W. 497;
- Buhl v. Kans. Life Ins. Co.* (New Mex.), 250 Pac. 635;
- Sallie Newsom v. Commercial Cas. Ins. Co.*, 137 S.E. 456;
- Int. Nat. Life Ass. v. Francis* (Tex.), 23 S.W. (2d) 282;
- Huntington Cab Co. v. Fed. & Cas. Co., Inc.*, 63 Fed. Supp. 939, citing 73 A.L.R. 414;
- Georgia Casualty Co. v. Mills*, 127 So. 555;
- Sentinel Life Ins. Co. v. Blackmer*, 77 Fed. (2d) 345, cert. denied, 80 L.Ed. 427;
- Bankers Health & Acc. Co. of Am. v. Shadden*, 15 S.W. (2d) 704;
- Trav. Ins. Co. of Hartford v. Diner*, 75 Fed. (2d) 3;
- Meyer v. Fed. Cas. Co.* (Ia.), 65 N.W. 328;
- Browning v. Equitable Life Ass. Soc. of the United States* (Utah), 72 Pac. (2d) 1060 (this case cited and approved by the Supreme Court of the State of Idaho in *Rauert v. Loyal Protective Assur. Co.*, supra).

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VI.

The burden was upon the appellant to establish its defense that the exclusions in the policy defeated recovery.

O'Neill v. N. Y. Life Ins. Co. (Ida.), 152 Pac. (2d) 707.

ARGUMENT.

Appellee will follow the propositions of law set forth in her points and authorities in the order thereof and insofar as the propositions therein are argued specifically, the following Roman numerals correspond with the numerals under the points and authorities and contain the arguments of appellee on the propositions therein set forth.

I and II.

It is appellee's view that this case on appeal can and will be decided under Rule 52 (a) as amended of the Federal Rules of Civil Procedure and that the sole and only questions involved are whether or not there was or is any evidence to support the findings of the trial Court.

It will be noted that appellant in its specification of errors object only to Finding No. 3, T-20; Finding No. 12, T-21; Finding No. 7, T-20 and Finding No. 9, T-21. These specifications are found on pages 8 and 9 of appellant's brief.

This Court held in *Occidental Life Insurance Co. v. Thomas*, supra, an Idaho case, that the Court will not weigh the evidence and that the findings of the trial Court will only be set aside if no reasonable man could logically infer accidental death from the evidence. The Court's opinion, T-11-18, contains certain evidence that caused the Court to consider that it supported a finding that there was a death by accident. The Court saw and heard Dr. Call, Dr. Brothers and Dr. Graves who were the only witnesses who appeared in person and gave oral testimony. The other expert witnesses testified by deposition.

There is a direct dispute among the experts. However, a fair consideration of the experts used by appellant shows that they could not determine the date of deceased without an autopsy. The testimony of Dr. M. M. Graves, T-146:

“Q. Assuming that he died at five a.m. April 8, 1948 in the light of that record from what cause could he have died?

A. He could have died from cerebro-vascular thrombosis, embolism; coronary thrombosis, embolism or pulmonary.

Q. Acute heart failure?

A. That is possible.

Q. Could the cause of his death be determined other than by autopsy?

A. In my opinion, no.” T-146.

(The first question quoted above refers to the date of death in 1948. This is an error as deceased died in 1947, but is immaterial whether it is typographical or counsel's error in submitting the question.)

Dr. Call performed the operation; was in constant attendance at the bedside of the patient and his testimony being direct and positive, the trial Court was certainly entitled to give it such weight as he thought it entitled to. The Supreme Court of Idaho has directly held in the cases cited, that a death under the circumstances of this case, is an accidental death, and in the case of *Teeter et al. v. Dairymen's Cooperative et al.*, supra, the Supreme Court of Idaho determined that an occlusion, thrombus or embolism could be an accident and quotes the testimony of two doctors as follows:

Dr. Call:

“When a man gets a coronary occlusion, he has a sudden tremendous injury to his heart.”

Dr. Pointdexter:

“This man died of a cardiac accident and to be more specific, a coronary occlusion.”

Dr. Call testified, T-94, “that the patient was swallowing his tongue”, which was certainly a violent exertion that could, under the testimony of Doctors Call and Brothers, result in an accident. Dr. Brothers testified, T-33:

“Q. Doctor, you say in this case the accident was not connected with the surgery?

A. In my opinion, it was not.”

Doctors Brothers and Call both based their opinion and their reasoning upon the proposition that the embolism could not have resulted from the hernia operation by reason of the time element.

Dr. Brothers, T-37:

“Q. You cannot say that it wasn’t connected with this operation?

A. I do not think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following the surgery to have been caused by it.”

Whether or not the majority of Courts or doctors would agree with Dr. Brothers’ testimony is beside the point. His background and qualifications, T-117-118, show that he is a competent, experienced physician and surgeon, and certainly a reasonable man would be justified in accepting his testimony.

Stress is laid by appellant upon certain questions propounded which contained a statement from text books that a certain percentage of deaths occur from pulmonary embolism following hernia operations and that, therefore, the Court was bound to find and believe that the insured’s death and the embolism was the result of a hernia operation. Such questions and statements are misleading, and the percentage of deaths from pulmonary embolism following hernia is of no benefit whatever unless it is shown the number of hernia operations. This is shown by the first question and answer of Dr. Brothers on re-direct examination, T-139.

III.

The law of the State of Idaho controls in this case which is based upon diversity of citizenship. This is not controverted by appellant, and a discussion would not assist the Appellate Court.

IV.

Reference has heretofore been made to the case of *Teeter et al. v. Dairymen's Cooperative et al.*, an Idaho decision. This decision is definite authority for the position of appellee, in contending that the death of the insured was a death by accident.

“Death of truck driver from coronary occlusion precipitated by exertion of loading 60 to 80 pound ice cream packages on truck in performance of regular duties, thereby accelerating or aggravating pre-existing diseased condition of heart, resulted from ‘accident arising out of and in course of employment’ so as to entitle decedent’s dependents to compensation. Code 1932, pp. 43-901 et seq.”

(From Syllabus 1.)

Rauert v. Loyal Protective Ins. Co. (Ida.) supra, justifies the decision of the trial Court in holding that the insured’s death was accidental. This case involved a hernia operation, but the operation for hernia was performed after the exertion and not before. It certainly could not affect the principle involved.

It is appellee’s view that the case of *O’Neill v. New York Life Ins. Co.* (Ida.), the same appellant settles the case insofar as defendant is concerned.

V.

It is appellee’s position that appellant, in writing the policy of insurance issued to the deceased, was under the necessity of so wording a policy that it could be sold by the sales department and in many instances

successfully defended against by the legal department. If the appellant's construction of the policy is correct, under no condition could the beneficiary in the policy recover if an accident befell Mr. Wilson following his operation for the reason it contends that Wilson would not have been where he was without the operation and that therefore he could not have had the accident. If through some unfortunate accident the floor of his room in the hospital had fallen or the roof caved in, there could not be a recovery, because he should not have been there, except for his operation. The same would be true if he were being conveyed in an ambulance and was killed in a collision.

The qualifying words found in the limitations of the policy and sought to be used as a complete defense, were, of course, placed there by trained legal and medical experts, not with the thought of making their meaning clear to the average business man, but to lull him into a sense of security. As the Supreme Court of the State of Idaho in analyzing a policy of insurance in *Kingsford v. Business Men's Assurance Co.*, supra, reasoned that if a policy of insurance was intended to mean a certain thing that the policy would contain language that would show the condition, the Court saying:

“Had it been the intention of the parties to this contract that exemption from payment of premiums was to be dependent on giving notice and making proof of disability, it would have been provided therein that failure to give the notice and make the proof while the policy was in force would terminate it.”

Applying the same analysis, appellee contends if the policy issued to the insured and the exclusions of the policy were intended to bar recovery if insured died after any operation, no matter what the cause or if he died from pulmonary embolism, no matter what the cause, it would have said so. In *Manufacturer's Acc. Indemn. Co. v. Dorgan*, supra, ex-President and Chief Justice Taft said:

“It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer.”

This case has been widely cited and quoted.

In *Beile v. Travelers Protective Assurance Co.*, supra, the insured died as a result of chloroform administered preparatory to a surgical operation. It developed in the postmortem that his heart and other organs were defective and that he was not in first class condition at all. However, the examination of a competent physician did not indicate such to be the case. What possible difference can there be whether chloroform or any sedative or any other treatment kills the insured unexpectedly, either before or after

his operation? The Court in discussing this phase of the matter said:

“but the difference is one of degree only. In the Young case the lung was not strong enough to withstand the strain of the lift. In this case the heart was not strong enough to withstand the effect of the chloroform. In each case the organ affected was too weak, but in neither case did the person know of the weakness. In order for the rupture or dilation to have been the natural and probable consequence of the lifting of the mail sack or the administering of the chloroform, and therefore not an accident, it must have been a result which was expected, or one which ought to have been expected, and this could not be without he knew of the defects in his heart or other organs or they were so apparent to the ordinary powers or means of perception that he ought to have known of them. There is no pretense that such is the case here. Even his physicians, with their learning, subjected him to the usual examination without suspecting his terrible internal condition. We conclude that the trial court erred in holding as a matter of law that Beile’s death was not by accident.”

The authorities cited, together with the case of *Jensma v. Sun Life Insurance Co.* (C.C.A. 9) *supra* required the trial Court to hold that the beneficiary was entitled to recover. The giving of the sedative did not originate internally. It originated externally. The choking, coughing and snoring was unexpected and certainly violent and the results were tragic.

Insurance companies know when they issue these policies, that men will grow older, that they become more susceptible to death from every cause; that they are not as alert in avoiding accident; that they have operations from time to time and that death is inevitable. These are the arguments for the purchase of every type of insurance. They can determine with exactness the average length of life of all people. As said by one of the Courts, a man is not required to be a Hercules to secure insurance. Why does he pay for accident insurance? Because he is convinced by the logical reasoning of the companies selling this insurance that he is likely to die from accident at any time.

VI.

Appellee does not believe that it will be contended that the Idaho cases cited under this particular point hold other than that the burden is upon the appellant to establish by a preponderance of the evidence that the death, if caused by accident is within the exclusions of the policy where the exclusions are pleaded as a defense.

ANALYSIS OF BRIEF OF APPELLANT.

Appellee is not concerned with the question of whether death itself is an accident. That question is not before the Court. Appellee has proven that the death in this particular instance was an accidental death.

The main contention of appellant is that the exclusions in the policy prevent the beneficiary from recovering because of the fact that the insured was suffering from disease, bodily defects or infirmity, which directly or indirectly caused his death and in this connection numerous cases are cited, and the best that can be said for this contention is that appellant contends that its position is the better and the majority rule. Attention is called to page 36 of appellant's brief and to the following statement:

"Further, the better and majority rule, where the policy contains only the coverage provision directly and independently of all other causes from bodily injury effected solely through violent and accidental means, is as follows: * * *"

Again on page 37 of its brief, appellant contends:

"It is clear that since the policy at hand contains the exception excluding death which results 'directly or indirectly from infirmity of mind or body, from illness or disease', that even though the sedative was considered to have constituted an external injury, without the pre-existing thrombus death would not have resulted, and respondent cannot recover."

Agreeing for the purpose of argument, that this proposition is supported by respectable authority, it is not the law as laid down by the Supreme Court of the State of Idaho and is directly contrary to the holdings of the Idaho Courts as shown by the cases quoted

Appellant in concluding its argument cites the case of *New Amsterdam Cas. Co. v. Cora Belle Johnson*

110 N.E. 475 and quotes a portion of the Court's opinion in which the Court said:

“* * * The apparent vice of it is that, if countenanced, it would inevitably result in the necessity of requiring constantly increasing premiums from the vast multitude of the laboring classes as well as the people of moderate means, who chiefly buy this character of insurance.”

Counsel for appellee flatly disagrees with such reasoning. It merely shows that this particular Court was drawing conclusions and not deciding the case at bar upon the evidence. The vast multitude of laboring classes and people of moderate means, who buy insurance, will be greatly aided if the insurance companies are required to write their policies in their entirety so that their meaning will be clear and unambiguous and so that the insured or his beneficiary are not required to endeavor to construe the meaning of words that the Courts and lawyers cannot agree upon.

It is respectfully submitted that the judgment should be affirmed.

Dated, Pocatello, Idaho,
July 12, 1949.

B. W. DAVIS,
Attorney for Appellee.



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Respondent.

REPLY BRIEF OF APPELLANT

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HON. CHASE A. CLARK, *Judge*

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN,
T. H. EBERLE,

Boise, Idaho,

Attorneys for Appellant.

FILED

JUL 25 1949

PAUL P. O'BRIEN, J.

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Filed

Clerk

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WHAT THE OPENING BRIEF ESTABLISHED

1. Decedent was given a sedative to relax and induce sleep; there was no allergy or hypersusceptibility to such sedative and the same did not cause any injury to decedent; snoring and coughing were unconnected with the sedative and only natural result of sleep; all parties knew decedent was a pronounced snorer and always snored when asleep; while any patient is asleep phlegm gathers in the trachia; coughing prevents pulmonary congestion; decedent's actions during and subsequent to operation were the same as in ordinary life; decedent's physician knew of all circumstances involved, including prior operations, personal habits, hazards of operative procedure and thrombi or blood clots;

50% to 80% of all post-operative deaths due to emboli; decedent had a bodily infirmity and disease, and due to the same a slight cough, whether in or out of the hospital, could have resulted in death, and such bodily infirmity and disease actually caused his death.

2. Dr. Call executed decedent's death certificate and was required by law to state primary and contributing causes, as well as course and sequence thereof, and although presumed to have complied with statutory duty, made no reference to the snoring or coughing or any untoward or unusual circumstance as contributing to death and did not state that the same was an accident, unless an embolism was so classed.

3. Decedent's death did not result independently of all other causes from bodily injury effected solely through accidental cause but was caused by bodily infirmity or disease.

WHAT APPELLEE'S BRIEF FAILED TO DISCUSS

1. Failed to discuss the first of the above points except to state there was a dispute among the experts and that under the Idaho law decedent's death was an accident.

2. Failed to even refer to the second point, above mentioned, and apparently relied on Dr. Call's oral testimony to impeach his written certificate.

3. Failed to even discuss the third point, above mentioned, and merely stated that the rule of law

set forth is supported by respectable authority, but the same is contrary to the holding of the Idaho courts, which statement we shall hereinafter discuss.

FINDINGS ARE CLEARLY ERRONEOUS

Appellee appears to rely upon Rule 52 (a) as amended. No amendment has been made to the provisions relating to setting aside of findings and the rule as stated by this Court in *Smith vs. Royal Insurance Company*, 125 Fed. 2, 222, that a finding does not command the strong presumption of verity where the "bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute." In the case at bar, not only was the evidence of four doctors by deposition (only three doctors testifying orally) and the death certificate also in writing, but as to all material facts there is no conflict whatsoever in the testimony.

As above noted, appellee's only reply to the testimony relied upon by appellant, is a statement that there is a dispute between experts. Counsel quotes briefly from the testimony of Dr. Call. It was Dr. Call, decedent's personal physician and appellee's principle witness, who, when the nurse reported loud, continuous snoring, assured her "this was a common thing with Mr. Wilson, that he always snored" (T. 63). It was Dr. Call who said decedent's actions during the operation and subsequent thereto,

were no different than in ordinary life (T. 115). It was Dr. Call who said that when asleep decedent was a pronounced snorer, whom he had known many years, and that the sedative merely induced sleep, and when asleep decedent would snore the same way, with or without an opiate (T. 115).

Not only did Dr. Call know of decedent's previous operations and that as a residue of such operations lots of people had blood clots (T. 130), but Dr. Brothers, appellee's other witness, admitted that he knew Dr. Call was aware of the hazards of the surgical procedure, not only the snoring and breathing proclivities of decedent, but also the hazards resulting from previous operations, and that even a light cough might loosen such blood clots (T. 130).

There is no conflict in the evidence that 50% to 80% of all post-operative deaths are as a result of an embolism. In fact, the only difference in the testimony of the doctors is in the phraseology of the foreseeability of post-operative death from embolism. All admitted that such death was a hazard of every operation; in fact, the greatest hazard. Drs. Call and Brothers felt there was not sufficient foreseeability to be an accident; Dr. Graves, who testified orally, and the four doctors who testified by deposition, all felt that the hazard was so well recognized that it could not be classed as an accident. Even Dr. Call was not certain of his conclusion when he signed the death certificate and said that it could not be classed as an accident unless embolism was so classed. Regardless of the conclusions

however, of these doctors, there is no dispute as to the facts.

There is no contradiction of the fact that decedent had no allergy or susceptibility to the sedative, nor that the sedative merely relaxed and induced sleep and when asleep decedent snored as he did in ordinary life, and that coughing was normal and encouraged to prevent pulmonary congestion, and it was well known to decedent and his doctors that with decedent's thrombosis, even a slight cough might cause death at any time, anywhere (T. 43, 95).

Appellee refers to Dr. Call's reference to the snoring and coughing as violent. An examination of his entire testimony, however, discloses that the actual facts are as stated in our opening brief. In other words, Dr. Call last saw decedent at eleven o'clock in the evening (T. 77). He did not see him again until after death. He had seen him several times during the day, but when he was there there was no such violence (T. 80), and he finally ended up by saying he based his opinion on the record (T. 77). An examination of the hospital record, however, does not disclose any record of any snoring after eleven o'clock. Accordingly, Dr. Call neither saw nor heard anything but the usual snoring of the decedent, nor was there anything in the record upon which to base generality of violence which he used and which was quoted.

Excluding the generalities volunteered by Dr. Call, the actual facts to which he testified correspond to the death certificate. In other words, limit-

ing his testimony to the actual facts based upon his personal observation and the hospital record, he neither saw nor heard, nor does the record disclose, anything other than the actions of decedent in ordinary life. As pointed out ultimately, Dr. Call actually did state that decedent's actions in snoring and coughing were no different than in ordinary life. As pointed out in our opening brief, the law required Dr. Call, in executing the death certificate, to show the cause of death, sequence of causes resulting in death, giving primary cause, contributing causes, and duration of each. His answers were:

"Immediate cause of death:

Pulmonary embolism

Duration:

Sudden

Due to:

Herniorrhaphy

24 hrs."

(See defendant's Exhibit 10.)

There was no reference to any untoward, unexpected or unusual circumstances. He is presumed to have complied with his statutory duty and therefore the facts to which he testified, not the gratuitous statements to help his personal friend, must be accepted, and hence there is no dispute between him and any other witness when he states that the sedative merely induced sleep, that all parties concerned knew when asleep decedent was a pronounced snorer and would cough to prevent pulmonary congestion, that decedent had a bodily dis-

ease and infirmity, that with such thrombosis, even the slightest cough might cause death, and that decedent's actions were no different during and subsequent to the operation as in ordinary life, and that such bodily infirmity in fact caused decedent's death.

IDAHO CASES CITED BY APPELLEE

May we first note that none of the Idaho cases cited by appellee involved the question of whether the death was by accidental cause, independently of all other causes, under the terms of an insurance policy, which question we shall discuss later in this brief.

Appellee relies principally upon the case of *Teater et al vs. Dairymen's Co-Operative et al*, 190 Pac. 2d, 687. This case arose under the Workmen's Compensation law, which the Idaho courts have construed in the nature of industrial insurance, and under a definition of an accident construed to be any injury which has a causal connection with the death and sustained in the course of employment. Claimant had a heart affliction and in the performance of his work lifted five gallon packers of ice cream and within ten minutes died of a heart attack. Undoubtedly the pre-existing condition contributed to his death. However, in the case of *Bishop vs. Morrison-Knudsen Co.*, 137 Pac. 2d, 963, Supreme Court of Idaho held: "When the death results from an injury sustained by accident and pre-

existing disease contributing concurrently and effectively to employee's death, no apportionment can be made." In other words, unlike the exclusion in the policy involved herein, the Court held that under the Idaho statute the mere fact that there were other contributing causes did not prevent the allowance of the full amount of compensation. Accordingly, the same Court in the case of *Teater vs. Dairymen's Co-Operative*, *supra*, said: "Our statute prescribes no standard of fitness, makes no distinction between the sound and unsound, which, being true, compensation under the act is not based on * health *." "The fact that the diseased was suffering or afflicted with a serious heart ailment, predisposing him to coronary occlusion, was of no consequence in the case *." Manifestly this case can have no applicability to the case at bar, and particularly to the requirement of the policy that appellee must prove that death resulted from bodily injury through accidental cause, independently of all other causes, and not directly or indirectly caused by bodily infirmity or disease.

In the case of *O'Neil vs. N.Y. Life Ins. Co.*, 152 Pac. 2, 707, where an altercation was involved, the Court said that: "It is not consistent with the experience of the average man that the one who enters into a brawl with his bare hands does so with the expectation that it may result fatally, if he has no reason to believe his antagonist is armed." Thus the Court indicated that if all the facts and circumstances were known, as in the case at bar, its decision would have been different. In other

words, as pointed out in the case of *Borneman vs. John Hancock Mutual Life Insurance Co.*, 45 N.E. 2d, 452, if the nature of the assailant was such that serious results might be foreseeable, there could be no accident. In that case there was also an altercation, but it was with a former prize fighter; it was therefore to be expected that the blows would be knockdown and knockout punches. The Court said: "Under such circumstances, the fall of the insured, with the concomitant injuries from impact with the pavement, cannot be said to be unforeseen, unexpected or extraordinary." So likewise, in the case at bar, all of the facts were not only known to the patient, but also to the doctor.

In the case of *Rauert vs. Loyal Prot. Ins. Co.*, 106 Pac. 2, 1015, the Court endeavored to discriminate between accidental means and accidental result. This is not material in this case because so far as the facts are concerned, the statement of Justice Cardoza in the case of *Landrass vs. Phoenix Mutual*, 291 U.S. 491, is applicable; "If there was no accident in the means, there was none at the result, for the two were inseparable * * *. There was an accident throughout or there was no accident at all." In other words, in the case at bar there was neither accident in the means nor in the result.

Appellee also refers to the case of *Jensma vs. Sun Life Ins. Co.*, 64 Fed. 2d, 457, decided by this Court and arising in the District of Idaho. The facts, however, cannot be brought within those of the case at bar. Illustrating the question involved, this Court

said: "It was admitted that ordinarily novocaine is absolutely harmless, and the evidence was that it proved fatal to the insured, who was a physician, because, unknown to himself and the operative physician, he had an 'idiocyncrasy' or hypersusceptibility to the drug." Counsel endeavors to bring himself within this rule. He states that the opiate resulted in snoring and coughing; such result is not an allergy or hypersusceptibility to the drug, because all of the doctors testified that the purpose of the opiate was relaxation and to induce sleep, and the coughing was proper procedure to clear the phlegm under all circumstances, and that the snoring habits of this man when asleep, however, induced, were not unknown to himself and the physician, and that neither such condition, nor his previous operations were unknown.

APPELLEE NEITHER ARGUED NOR PROVED THAT DECEDENT'S DEATH RESULTED DIRECTLY AND INDEPENDENTLY OF ALL OTHER CAUSES FROM BODILY INJURY EFFECTED SOLELY THROUGH EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS, AND WAS NOT CAUSED DIRECTLY OR INDIRECTLY BY BODILY INFIRMITY OR DISEASE

Whether we accept appellee's play on words in saying that decedent would not have died of a blood clot if he had not had the last hernia operation, but that he did not die as a result thereof, or accept that fact that fifty to eighty percent of all post-operative deaths are due to blood clots, and such is a foreseeable hazard and expectation in all operative procedure, the fact remains that appellee's contentions and proof, adopted by the trial Court, are that decedent's death was due to a settled and determined bodily disease and infirmity.

Here, again, there is no conflict in the testimony to the effect that decedent did have a pre-existing bodily infirmity and disease. Appellee's doctors testified that decedent had a pre-existing thrombosis, the residue of prior operations. All of the expert witnesses, those testifying orally as well as by deposition, agreed that such thrombosis was a venous disease and a settled and determined bodily infirmity. Dr. Call testified:

Q. Whether you say it came from the operation performed on April 7 or whether it came

from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir (T. 107).

In addition to testifying that such bodily infirmity and disease caused the decedent's death, Dr. Call further testified that where you have such a condition you can expect untoward results, saying:

Q. The condition of the venous system is a co-existing condition. With surgery depending on that condition you have certain natural results, is that so, Doctor?

A. If you have a diseased venous system you can expect untoward results (T. 90).

Dr. Brothers, appellee's other witness, confirmed Dr. Call as follows:

Q. I think you said that the condition of his bodily infirmity with reference to snoring and coughing was the exciting cause of the embolism?

A. Yes, sir (T. 129).

The insurance policy involved, in plain and every day language, sets out the risk covered under the double indemnity clause and requires that death result directly and independently from all other

causes. As said in *White vs. New York Life Insurance Company*, 145 Fed. 2d 504,

“Under these provisions death must not only be caused from bodily injury effected through accidental cause, but it must not result directly or indirectly from physical or mental infirmity, illness, or disease.”

Appellee's witnesses testified that the hernia was a contributing cause but that the bodily infirmity or disease of decedent was the primary cause of death.

Q. What could have been the primary cause if the hernia was the contributing cause?

A. Primarily it was due to the fact that there was a thrombus in the venous system (T. 103).

Dr. Graves, whom appellee quotes, describes the condition of decedent as a disease process.

Q. Can this be designated as a disease process of the veins?

A. Of the venous system (T. 149).

Dr. Beeman also referred to the condition as a diseased process of the venous system (T. 158).

Appellee's witness, Dr. Brothers, also testified that in view of the existing bodily infirmity, the amount of snoring or coughing, is immaterial (T. 130).

It is interesting to note that neither appellee in her brief nor the trial judge in his opinion discuss this testimony of appellee's witnesses.

This proof of appellee is so clear that it is not even mentioned in appellee's brief, but on page 16, appellee states that the rule set forth in our opening brief under the coverage provisions of the policy, requiring death from accidental cause to be independent of all other causes and not result directly or indirectly from bodily infirmity or disease, is supported by respectable authority but is not the rule in Idaho. No Idaho case, however, is cited involving such coverage provisions. Even in the case of *Browning vs. Equitable Life Assurance Society*, 72 Pac. (2d) Utah 1060, the Court specifically said:

"The policy before us does not provide that recovery shall be had only if no other circumstances than the accident contributes to the disability."

Appellee states this case was approved by the Supreme Court of Idaho in *Rauert vs. Loyal Protective Assurance Co.*, *supra*, but this is not the fact. Our Court merely approved certain language relative to liberal construction of insurance policies. The Utah case was severely criticized by the Chief Justice of the Utah court in an elaborate dissent and has never been adopted by any other Court. Appellee also quotes from the case of *Manufacturers' Accident Indemnity Corporation vs. Dorgan* 58 Fed. 945, but neglects to say that Chief Justice

Taft approved the rule set forth in our opening brief to the effect that no recovery can be had where death was caused or contributed to directly or indirectly by bodily infirmity or disease. Chief Justice Taft affirmed and approved the following instruction of the lower Court:

“I instruct you, if he was at that moment overtaken with a trouble of which he was subject—that is, from a recurrence of a trouble to which he was subject—and he then fell in the brook and was drowned, that that would not be a case where a recovery could be had upon the policy, because his physical condition was a part of the causes contributing to the death.”

Where a similar clause was contained in the policy, the Court, in *Smith vs. Federal Life Ins. Co.*, 6 Fed. 2d 283, said:

“The defendant wrote a guarantee against a certain sort of accident. That sort that ‘directly’ and ‘independent’ of other causes, ‘through external, violent, and accidental means’ produced the injury. The heart trouble was not ‘external’ nor ‘violent,’ nor was it an accidental malady. It was the residuum of a very troublesome and serious illness. The two contributed to, and caused death. I believe the law and the facts are with the defendant, and the jury will bring in a verdict for it.”

In *Preferred Accident Ins. Co. vs. Clark*, 144 Fed. 2d 165, where there was a bodily infirmity in the nature of a gall bladder ailment, the Court said:

“For example, one who submits to a simple appendectomy, where the condition is not acute, knows that he may be one of a comparatively small number who will die as a result of the operation. He does not expect death but he knows it may occur. In such cases, we do not think an ordinary man would say that the death was accidental. Here, the insured was suffering from a chronic gall bladder ailment. In addition to that, his appendix was seriously involved. He was also suffering from a parenchymatous degeneration of the liver and kidneys. He was 62 years of age. We do not think that the ordinary man, under the attending facts and circumstances, where a major operation in the upper abdominal cavity caused a pulmonary collapse resulting in death, would regard the death as accidental.”

Decedent in the case at bar was also approximately 62 years of age.

It will be noted that in the case of *Beile vs. Travelers Ins. Co.*, 135 S.W. 497, cited by appellee, the Court did not pass upon a settled and determined bodily infirmity, as testified to by the doctor in the case at bar, but based its opinion upon mere lowering of vitality, saying: “In such case disease or low vitality does not arise to the dignit

of concurring causes, but in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

In the case of *Howe vs. National Life Ins. Co.*, 72 N.E. 2d 425, where the bodily infirmity was an existing heart disease, the Court held:

"The proofs construed most favorably to the plaintiff demonstrate the aggravation of an existing heart disease by an accident, and that the disease and the accident were the concurrent causes of death. But a death caused by the joint operation of a pre-existing disease and an accident is not within the scope of the policy. *Page vs. Commercial Travellers' Eastern Accident Association*, 225 Mass. 335, 114 N.E. 430; *Leland vs. United Commercial Travelers*, 233 Mass. 558, 124 N.E. 517; *Kramer vs. New York Life Ins. Co.*, 293 Mass. 440; 200 N.E. 390; *Aetna Life Ins. Co. vs. Ryan*, 2 Cir., 255 Fed. 483, 486; *Mutual Life Ins. Co. vs. Loeb*, 5 Cir., 107 Fed. 2d 7; *McMartin vs. Fidelity & Casualty Co.*, 264 N.Y. 220, 223, 190 N.E. 414."

Again referring to similar provisions in a policy, where the bodily infirmity was a heart condition and the question arose as to whether he died of an overdose of medicine taken by mistake or accident,

the Court, in *White vs. New York Life Ins. Co.*, supra, held:

“When the evidence is considered in the light of these provisions in the policy, it seems clear that if it be assumed that the insured took by mistake an overdose of medicine and that he had an accidental fall, and that either or both contributed to his death, appellant would not be entitled to recover in view of the positive and uncontroverted evidence that the insured’s heart condition likewise contributed to his death.”

No Court in Idaho has ever held that the double indemnity provisions of a policy involved, for which decedent paid a quarterly premium of \$1.35, are invalid or inapplicable in this state, nor has appellee cited a single case contrary to the rules of law pertaining thereto, set forth herein and in our opening brief.

CONCLUSION

Appellee’s brief, with one exception, does not even comment upon a single case cited by appellant; neither does it discuss the uncontradicted facts, and particularly the proof offered by the appellee, as hereinbefore pointed out, nor does it cite a single Idaho case applicable to the facts at bar, any case contrary to the decisions referred to in appellant’s

brief, nor any valid argument why the judgment of the trial Court should not be reversed.

Respectfully submitted,

J. L. EBERLE,

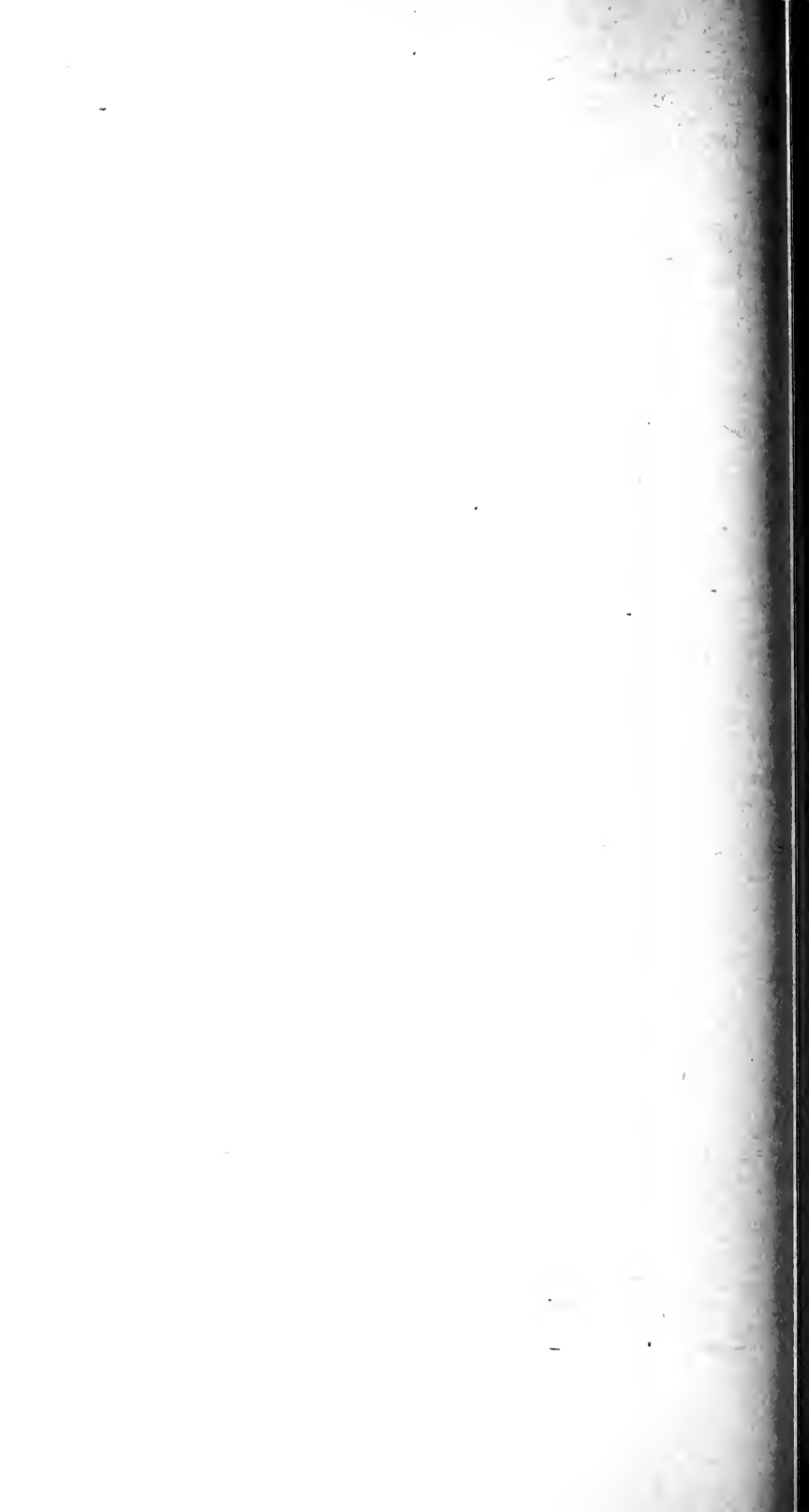
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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
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vs.

CECELIA J. WILSON, *Respondent*

APPELLANT'S PETITION FOR REHEARING

*On Appeal from the United States District Court for the
District of Idaho, Eastern Division*

HON. CHASE A. CLARK, Judge

J. L. EBERLE,
B. S. VARIAN,
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FILED

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APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions this Honorable Court to grant a rehearing in this cause for the reason that it appears from the opinion filed herein on November 21, 1949:

(a) That there is no basis for the implications, and reflection upon the Supreme Court of Idaho, contained in the statement in the opinion that "the Idaho Court must almost certainly be counted because of its uniform emphasis of a rule of interpretation favorably, whenever permissible, to recovery" against an insurance company.

(b) That the Court must have overlooked the fact that the Supreme Court of Idaho has never approved, insofar as the principles of law are concerned for which this Court cited in its opinion the Browning case, which is without precedent and has never been cited or quoted for such principles by any court in any state, and as to such purported principles has been overruled.

(c) That the rule in Idaho under its Workmen's Compensation Law, as applied in the opinion to determine accident per se, is not the law of Idaho as applicable to the construction of insurance policies, and the result of the application of such Workmen's Compensation Law, as in the opinion set forth, can only result in thwarting the terms and general object of insurance policies.

(d) That the opinion shows the Court apparently brushed aside the established rules of this Court and the majority of all other courts by merely referring to the snoring and coughing being connected with the sedative as an unforeseeable result therefrom and without even discussing the facts to which a major portion of the briefs were directed, and particularly the testimony of the two doctors, upon which evidence the opinion relies, who testified, without contradiction, that there was no connection between the sedative and the snoring and coughing because the sedative merely produced sleep and whenever asleep, however induced, the actions of the insured were the same, all of which actions were not only foreseeable, but known to the insured as well as to the doctor.

(e) That the legal principles assigned as supporting the opinion are neither the law of the State of Idaho nor applicable to the facts in the case at bar.

(f) That the testimony of the expert witnesses was apparently ignored and the medical opinion of the Court substituted therefor.

(g) That after a further exhaustive investigation, we are convinced that the opinion is without supporting authority and goes so far beyond any rule or doctrine here-

tofore announced by the Supreme Court of Idaho or the great weight of authority in other jurisdictions, that it should, in our opinion, be reviewed and considered further before it is finally announced as the decision of this Court.

ERROR No. 1

The Law of Idaho

Astounding were the following references in the opinion to the Utah case of Browning v. Equitable Life Assur. Society, 94 Utah 532, 72 P. (2d) 1060:

"The situation of pre-existing disease dealt with in Browning v. Equitable Life Society, *supra*, has already been sufficiently described; and *the approval several times given that decision by the Idaho court carries a significance we are not justified in ignoring.*" (Emphasis ours). (Page 7).

Commenting upon the Idaho case, Rauert v. Loyal Protective Ins. Co., 61 Idaho 677, 106 P. (2d) 1015, the opinion (p. 4) states:

"In its opinion the court (Idaho) cited with approval Browning v. Equitable Life Assur. Soc., 94 Utah 532(4)." * * * * (Footnote 4). Similarly in O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. (2d) 707, hereafter discussed, "*the Browning case was strongly relied on.*" (Emphasis ours).

ARGUMENT:

The law for which the Court cites the Browning case has never been the law of Idaho, and we earnestly trust it never will be as long as the Court has any regard for contracts and its heritage.

It is respectfully submitted that the holding in the Browning case has never been approved by the Idaho court; that the Browning case has been criticized and overruled by the Utah court; that the problem presented herein by the undisputed facts in the record is not analogous to the facts before the appellate court in the Browning case and that it has never been followed by any other court.

The Browning case was first cited in *Rauert v. Loyal Protective Assurance Co.*, 61 Ida. 677, 106 P. (2d) 1015, 1018. Reference was made to certain language in the Browning opinion relating to the rule that insurance policies are to be liberally construed in favor of the insured. The language quoted from the Browning case is a statement of the rule of construction long adhered to in Idaho, as is shown in the paragraph following the language quoted from the Browning case, in the *Rauert* opinion, p. 1018:

“This court, like the Utah Supreme Court (*Browning v. Equitable Life Assurance Society, supra*), is committed to the rule of liberal construction of insurance policies. In *Sweaney & Smith Co. v. St. Paul, etc., Insurance Co.*, 35 Idaho 303, 315, 316, 206 P. 178, 182, we held that a ‘clause in an insurance policy being susceptible of more than one construction, the one most favorable to the insured will be adopted (citing cases).’ Contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation. The rule of liberal construction was adhered to in *Sant. v. Continental Life Insurance Company*, 49 Idaho 691, 291 P. 1072; *Maryland Casualty Company*

v. Boise Street Car Company, 52 Idaho 133, 11 P. (2d) 1090; Watkins v. Federal Life Insurance Company, 54 Idaho 174; 29 P. (2d) 1007; Kingsford v. Business Men's Assurance Company, 57 Idaho 727, 68 P. (2d) 58."

It is clearly apparent that the incorporation of the statement of the rule of liberal construction was neither a reliance upon the Browning case, nor an approval of the law for which it is cited in the opinion. Further, the statement to which reference was made, neither added to nor changed the Idaho law.

Reference is made to the same language noted herein from the Browning case in the Idaho case of Rollefson v. Lutheran Brotherhood, 64 Ida. 331, 132 P. (2d) 758, 762. The language is contained in a comment upon the Rauert case as approving the rule of liberal construction in connection with construction of a disability provision in the policy then under consideration—a problem not now under consideration. Likewise, the case of O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. (2d) 707, 710, again cites the Rauert case and includes the same quotation from the Browning case for the proposition of liberal construction. But there is no language contained in the O'Neil case from which it can be inferred that the Idaho court either approved or relied upon the holding of the Browning case. The Browning case has been severely criticized by the Utah court, Lee v. New York Life Ins. Co., 95 Utah 445, 82 P. (2d) 178, 180:

"I think such holding (Browning) is without precedent in the United States. It seems difficult to conceive of any case where there may be any inter-

action of the results of an injury and the results of some other independent cause regardless of how paramount, efficient of concurring the other independent cause may be in producing the death or incapacity which, under that holding, would not be covered by the policy. The only case which would apparently not be covered by the policy would be where the course of the chain leading from the injury and the course of the chain leading from the other cause, be it a disease, toxemia, infection, or what not, were shown to be entirely separated without any interaction one with the other. Certainly, under the Browning case, which I think is beyond the outside circle of liability arising from any reasonable construction of the policy, this case must be decided against the insurer."

Further, the Browning case appears to have been overruled by the Utah Court in a later case, *Tucker v. New York Life Ins. Co.*, 107 Utah 478, 155 P. (2d) 173, 177:

"In this case the accident set in motion forces (increased blood pressure) which, working on a pathological condition, caused death. Certainly if recovery is not allowed in this case because the injury did not cause the death independently of the disease, recovery should not for stronger reasons have been allowed in the Browning case. *Therefore, I think the holding in this case must overrule the Browning case.*" (Emphasis ours).

In the Tucker case it appears that the same policy provisions as involved herein were present. The facts in that case, as herein, were not in dispute. The insured accidentally slipped and fell on an icy sidewalk sustaining a fractured arm. The *undisputed* medical testimony ac-

cording to the plaintiff's own doctors showed that the insured had been suffering from high blood pressure for at least a year prior to his fall. The fall caused the breaking of an aneurism of the aorta which resulted in death. Upon this undisputed evidence the court held (p. 176):

"Mr. Nichol's condition at the time of the accident was one in which he had an existing disease which cooperated with the accident in causing his death. *This compels us to conclude that the accident cannot be considered the sole cause of insured's death, and from this factual picture we must conclude that this case is one which falls within the third class of cases as set forth in Mr. Justice Larson's opinion in Browning v. Equitable Life Assur. Society, supra, and the cases there cited.*" (Emphasis ours).

The pertinent part of the classification of cases to which the court referred in the Browning case is quoted on page 175 of the opinion in the Tucker case then under consideration (155 P. (2d) 173):

"(3) When at the time of the accident, *there was an existing disease* which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes. (Citing cases)."

As pointed out in the opinion in the instant case, the Browning case was originally considered (72 P. (2d) 1060) without being aware of the "exclusion clause" (page 4). Upon rehearing (80 P. (2d) 348) the exclusion clause was for the first time considered, but the Court justified the previous holding upon the ground that the record did not show evidence of a pre-existing disease of

infirmity. Had the court found such evidence, the holding would of necessity been for reversal under the court's own statement of the law governing the case. (80 P. (2d) 353) :

"We have again read the record through a number of times to see if there was any evidence that the insured was suffering from disease, bodily infirmity or bacterial infection, within the meaning of such terms, when used in exception clauses of accident insurance policies, such as this, *and we unhesitatingly say that there is no evidence to that effect.*" (Emphasis ours).

However, when the exclusion clause for the first time was considered on petition for rehearing, Chief Justice Folland, who had concurred in the original opinion, added his dissent to that of Mr. Justice Wolfe, making the holding a three to two decision. But in any event, it is clearly shown by the Tucker case, *supra*, that when the Utah court is confronted with undisputed evidence that the insured at the time of the accident had a pre-existing disease or bodily infirmity which cooperates with the accident to produce the injury or death, there can be no recovery under the double indemnity clause of an insurance policy containing the above noted exception or inclusion clause.

In other words, in the Tucker case, an artery, called the aorta, had a dilation filled with blood which is called an aneurism. The insured fell, fractured his arm, and because of the increased blood pressure the aneurism broke loose, resulting in death. Although the insured had high blood pressure, the court based its opinion upon the following quotation: "The court finds that an aneurism is a disease as a matter of law, and that a death from the

rupture of the aneurism of the abdominal aorta is a death which resulted directly from bodily infirmity or disease." In other words, the aneurism which is a dialation of an artery containing blood, was a diseased condition of the artery, just as a thrombosis was a diseased condition of the venous system. A fall causing the rupture of the artery, releasing the blood sac, resulting in death, is certainly no more of a bodily infirmity than a thrombosis which as a result of any force is broken so that a part thereof is released, resulting in death. As repeatedly pointed out in our briefs, there is no contradiction nor dispute in the medical testimony that thrombosis is a venous disease and that anybody with thrombosis has a diseased condition. So, likewise, there is no dispute nor contradiction in the testimony of all of the experts that thrombosis is a bodily infirmity. In fact, the very doctor upon whose evidence the opinion relies, testified that the embolism was caused by thrombosis. (t. 138).

The opinion states that "except for this mishap (insured) might have lived out his days and died of old age" (page 5). This certainly was not taken from the record or from any Idaho case. Presumably this doctrine was also adopted from the Browning case. In the Tucker case, except for the strain of the accident, certainly the insured would have had a greater expectancy of life with the aneurism than the insured in the case at bar with his thrombosis, which the two doctors, upon whom the opinion so strongly relies, testified without dispute might have broken loose at any time with even a slight effort,

slight cough, even sitting in a chair or taking an enema, all of which has been fully discussed in our briefs.

While it is immaterial since the law attributed to the Browning case was not referred to by the Idaho court, it is noted that any reference in Idaho decisions to the Browning case, was made to the original opinion where the exception clause was not considered and not to the case on petition for rehearing where such clause was first before the court. It is further noted that the opinion on petition for rehearing in the Browning case (80 P. (2d) 348, 351) gave some weight to the fact that the language in the exception clause in that policy employed the word "caused". In the policy now under consideration, the exception is directed to non-coverage of losses which "resulted" "directly or indirectly from bodily infirmity or disease. Not only has the Browning case not been approved by the Idaho Court, but counsels' research fails to find any court other than the court of origin which has approved or relied upon the holding therein.

The opinion also refers to the case of *Watkins v. Federal Life Insurance Company*, 54 Idaho 174, 29 P. (2d) 1007, as sustaining the rule for allowing recovery against an insurance company wherever "permissible". Neither court nor counsel can find anything in this case to so imply. It was certainly a question of fact as to whether the object which struck the insured's eye was put in motion by the accident which wrecked the wagon. It was certainly a reasonable inference from the undisputed testimony that the object destroying the eye came from, or was set in motion by, the wreck.

The intimation in the opinion that it is impossible to ascertain just what the Idaho court meant and what cases it relied upon in arriving at its decision in the case of *O'Neil v. New York Life Ins. Co.*, 65 Ida. 722, 152 P. (2d) 707, 722, is apparently also made in support of the purported rule of construction of the Idaho Court. The fact is that the court reversed the case for errors in three instructions, two of them pertaining to the definition of an accident, which is in line with the prior holdings of the court, and the third, which stated that the burden was upon the company to prove its affirmative defenses that the death of the insured, O'Neil, occurred within one of the exceptions contained in the policy and which the trial court refused to give. The case was sent back for retrial, and there is certainly nothing unsound about the court's statement that "it is not consistent with the experience of the average man that one who enters into a brawl with his bare hands does so with the expectation that it may result fatally, if he has no reason to believe that his antagonist is armed". This is in line with the great majority of cases, and as pointed out in *Bornerman v. John Hancock Mutual Life*, 289 N.Y. 295, 45 N.E. (2d) 452, where the altercation was such that serious results might be foreseeable and knockout blows could be expected, it could not be said that serious injuries were not foreseen or unexpected.

In the case of *Wheeler v. Fidelity & Casualty Co.*, 298 Mo. 645, 251 S.W. 924, cited by the court in its opinion (page 5), we should call the court's attention to the fact there was only an insuring clause and no exclusion clause. There was a conflict in the evidence. The medical testimony made the conclusion possible that the thrombus was

caused by the eye trouble and the court said "it is highly probable, therefore, that the thrombus effecting the death in this case was caused by the "infection from the eye".

The opinion also cites, in support of its decision, the case of *Rauert v. Loyal Protective Ins. Co.*, 61 Idaho 677, 106 P. (2d) 1015. One of the issues in this case was the question of a pre-existing disease. As a result of an operation adhesions had formed a fibrous ring on the abdominal wall. Under the rule as laid down by this Court, purporting to be the law of Idaho, it would not have been necessary for the court to even discuss disease as a cause of the accident. The court certainly would have had occasion to lay down the same principles as laid down by this court in its opinion, and for which it cites the Idaho cases.

The fact is that the Idaho court in the *Rauert* case did consider disease as a valid defense and discussed it. The Court said:

"While Dr. Stewart answered the leading question: "Q. This opening and ring that you spoke of was a diseased condition of the body" - "A. Yes, it was an adhesion, or an old adhesion, that happened to have a hole through it", it is not clear whether he intended to testify that the fibrous ring was in fact a disease or simply an adhesion. And it will be noted that neither Dr. Stewart nor Dr. Chaloupka used the word 'disease'. However, Dr. Woodward testified that he 'would not call it disease;' in other words, that it was not a disease. The jury found against appellant and under the well settled rule its verdict will not be disturbed."

If the law of Idaho is as stated by this court in its opinion to be, why didn't the Idaho court so hold?

Why did it say that this defense was a question of fact? Why did it discuss the fact that there was a conflict in the evidence as to disease? There is nothing in this case, nor any other Idaho case, to support the principles of law attributed to the Idaho court in the opinion of this court, nor to apply to the Idaho court the principles of law attributed to the Utah court in the Browning case, which, as heretofore mentioned, as far as we can find, had never been quoted or cited by any other court in any other jurisdiction, and as heretofore pointed out, is not the law of Utah.

ERROR No. 2

Workmen's Compensation Law Inapplicable

On Page 3 of the opinion, the court discusses the case of *Teater v. Dairymen's Cooperative Creamery*, 68 Idaho 152, 190 P. (2d) 687, applies the principles thereof and the Workmen's Compensation Law of Idaho and states that it is of value in considering what is accident, per se:

ARGUMENT:

The purpose of the Workmen's Compensation Law is that "sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy". (Sec. 72, 102 Idaho Code).

Although workmen's compensation is not in the nature of health insurance, injuries in the course of the employment resulting from the exertions of the employee, are

certainly held to be covered. In the Teater case the court said "that it was the work that Teater was doing at the time of his death which caused an accident accelerating the diseased condition of his heart".

This is in line with the court's decision in *Wade v. Pacific Coast Elevator Co.*, 64 Idaho 176, 129 P. (2d) 894, where the employee likewise died of heart difficulty but compensation was denied because the board "evidently did not believe, or choose to adopt, the opinions of those experts who said it was probable or possible that death resulted from the exertions of the employee on the date of his death".

As illustrating "accident" under the Workmen's Compensation Law, consisting of exertion in the scope of the employment, the *Larson* case, 48 Idaho 136, 279 Pac. 1087, involved an aneurism similar to the *Tucker* case, heretofore mentioned. The question was whether the aneurism spread further than it had been before, or resulted from a breaking away from the aneurism entering the bloodstream and causing an embolism. The court said:

"It therefore seems clear that as a result of the work being performed by the deceased the latent physical defect, the aneurism, was accelerated or aggravated and progressed farther, causing death. The strain may not have been unusual, and even slight, but if it caused the death of the deceased it was an accident that is compensable. (*Pace v. North Dakota*, supra; *Knock v. Industrial Acc. Com.*, supra; *Patrick v. J. B. Ham Co.*, 119 Me. 510, 111 Atl. 912, 13 A.L.R. 427; *Peoria Ry. Co. v. Industrial Acc. Board*, 279 Ill. 352, 116 N.E. 651; *Pisko v. Nelson*, 4 N.J. Misc. 154, 132 Atl. 301; *Smith v. Primrose*

Tapestry Co., 285 Pa. 145, 131 Atl. 703; *Cole v. Department of Labor and Industries*, supra)."

Moreover, although the statutes specifically provide for the splitting of benefits in the case of disability where there is pre-existing infirmity, this does not apply to a death case. In *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P. (2d) 963, the court said:

"This is a death case; which, being true, Section 43-1123 I.C.A., amended by Session Laws, 1941, Chapter 155, page 310, has no application. Said amendment is limited to disability resulting from an accident, and so far as material here is as follows:

"43-1123. Deductions for pre-existing injuries and infirmities. —*****

"(a) If the degree or duration of disability resulting from an accident is increased or prolonged because of a pre-existing injury or infirmity the employer shall be liable only for the additional disability resulting from such accident. * * * *"

"The above provision, no doubt, was copied from Title 26, §288, Code of Alabama, 1940, formerly Section 7561 of the Alabama Code, 1923, in which the following provision will be found: 'If the degree or duration of disability resulting from an accident is increased or prolonged because of a pre-existing injury or infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed.'"

As pointed out in the *Teater* case, there is no standard of fitness provided for in Idaho Workmen's Compensation Law; and pre-existing disease or infirmity is immater-

ial in a death case as long as it resulted from exertion during the course of employment.

We know of no court that has ever adopted the decisions carrying out the general purposes of workmen's compensation laws to the construction of insurance policies.

ERROR No. 3

Knowledge of Insured and Physician

The opinion states that the embolus was produced by the extraordinarily violent snoring, coughing, and choking, resulting unforeseeably from the administration of sedatives incident to the operation (p. 1); that Drs. Call and Brothers performed or aided in the operation; that no autopsy was performed (p. 2) although insurer was given opportunity, and the case of *Jensma v. Sun Life Assur. Co.*, 64 F. (2d) 457 supports the court's position as to accident. (P. 3).

ARGUMENT:

Perhaps we should first call the court's attention to the fact that the statement in the opinion "the equally reputable and eminent surgeons who performed or aided in the operation" is not in accordance with the record, because only Dr. Call attended the insured and Dr. Brothers was merely an expert witness, as were Drs. Stewart, Pittenger, Swindell, Beeman and Groves, even though the court apparently feels that Dr. Brothers should be singled out from these expert witnesses and his testimony accepted, although he did not have anything more to do with the operation or the patient than the other expert witnesses.

The court adopted the testimony of the insured's physician that the embolus was caused by a pre-existing thrombus for the reasons stated in such testimony. Therefore, the origin of the embolus having been ascertained there was no need for an autopsy, and such post-mortem examination would have added nothing to the facts herein.

Assuming respondent's theory that the thrombus resulted from a prior operation, there is no conflict in the testimony that both the insured and his attending physician and friend knew that when the insured slept he was a pronounced snorer and that sleeping always had the same effect upon him, however induced. As pointed out in our briefs, when the nurse called the doctor's attention to his snoring and actions, the doctor assured her that it was normal with the patient. It was also pointed out at length that by the admission of his own doctor, insured acted, subsequent to the operation, as he would have in ordinary life if asleep.

Thus, while the respondent's medical witness stated it was his opinion that the sedative caused the snoring and coughing, the facts brought out on cross-examination of the same witness, conclusively show that the sedative did not cause the coughing and snoring. *And upon the facts, not the opinion of the witness, there was no accident caused by external means.* And regardless of whether or not it might be found that the snoring and coughing caused the embolus to break off from the pre-existing thrombus such accident is not within the coverage provided by the policy.

The attending physician did say that the death was un-

expected. However, as pointed out in our briefs at length, such a statement was a general one and the doctor thereupon testified to the actual facts. His testimony is uncontradicted and undisputed, that both he and the insured knew that whenever he slept he always snored and that his actions were "no different than in ordinary life; a snorer does the same thing without an opiate". (t. 115). The excerpts from the record relating to the facts as to the knowledge of both doctor and insured are quoted at length in our prior briefs. Although much of these briefs is devoted to this question, the only reference in the opinion seems to be that the embolism resulted unforseeably from the sedative.

No reference is made to the arguments contained in the briefs that there was no connection between the sedative and the snoring. The sedative merely produced sleep, and when he slept, no matter how induced, his actions were always the same. This was known to both doctor and insured. How, then, could it have been unexpected?

As above noted, reference is made to the Jensma case to support the holding of this court. The reason the result was unexpected in the Jensma case was because of the idiosyncrasy or hyper-susceptibility of the patient in that case. However, it was definitely stated by this court that such peculiarity or idiosyncrasy was "unknown to himself (patient) and the operating physician". In the case at bar, everything that occurred was admitted by the operating physician to have been known to him, and yet the court makes no effort to even discuss the basis upon which the case at bar can be brought within the Jensma case.

The ruling in the Jensma case follows the majority of the cases, most of which contain this quotation "it is true that the doctor intended to apply the drug, and insured intended that he should apply it; but neither intended to apply it to a body possessed of the idiosyncrasy. Death resulted because of their applying the drug in ignorance of this peculiarity in the object acted upon, and was a result not calculated or intended, and one which could not reasonably have been foreseen". No case can be found to sustain the provision that where neither the insured nor the physician was ignorant of the peculiarity the result was accidental, nor can the general statement that the death was accidental and unexpected be accepted by a court where the same is a mere conclusion of the doctor, when the facts to which he testified clearly show that he knew exactly how the patient would react when asleep, regardless of how such sleep was induced.

ERROR No. 4

Proximate Cause

The majority opinion (p. 4) in attempting to apply the rule of proximate cause to the case at bar, applies the law of negligence and disregards the exception clause of the policy under consideration and its effect upon any possible use of the rule of proximate cause herein. The following language is from the majority opinion, p. 4;

"Discussing an insuring clause identical with the one now being considered the Utah court (Browning case) observed that it was 'not required to search beyond the proximate, efficient, and inducing cause to see if there may be latent causes.' It held that the

insured's proof fulfilled the policy conditions and that indemnity was payable for the full term of the disability. Consult the same case on petition for rehearing, 80 P. (2d) 348 where policy exclusions comparable with the present were noticed and held not to preclude recovery."

ARGUMENT:

When the full pertinent reference is read, it is apparent that the discussion of proximate cause was made assuming that the policy did not contain an exception clause.

"The policy before us does not provide that recovery shall be had only if no other circumstance than the accident contributes to the disability either proximately or remotely, directly or indirectly, wholly or in part. We are not required to search beyond the proximate, efficient, and inducing cause to see if there may be latent causes." (Browning case, 72 P. (2d) 1060, 1076).

On petition for rehearing the exception clause was called to the court's attention. The affirmance of the original opinion was made, not on the ground that the rule of proximate cause governed where the policy contained the exception clause, but upon the ground that there was no evidence that the insured was suffering from a pre-existing disease which cooperated with the accidental injury to produce the disability. As previously pointed out herein, any other holding would have been contrary to the law governing the case as announced by the court in its original opinion.

"We have again read the record through a number of times to see if there was any evidence that the in-

sured was suffering from disease, bodily infirmity or bacterial infection, within the meaning of such terms, when used in exception clauses of accident insurance policies such as this, and we unhesitatingly say that there is no evidence to that effect." (80 P. (2d) 348, 353 Browning case on peition for rehearing).

It has been held almost without exception that where the policy contains an exclusion clause in addition to the insuring clause, the rule of proximate cause has no application in determining liability under the exception clause. The application of this rule is shown in the recent Washington case of *Evans v. Metropolitan Life Ins. Co.*, 26 Wash. (2d) 594, 174 P. (2d) 961, 977:

"The evidence of the doctors, the pertinent portions of which are set out in this opinion, was to the effect that the condition of the insured's heart contributed to his death. The term "proximate cause" has no application in ascertaining liability upon policies which contain clauses relieving the insurance companies from liability in cases where death is caused or contributed to directly, or indirectly, or wholly or partially, by disease, and the evidence showed that the disease contributed to the death. Where the liability of the insurance company is so restricted it is not sufficient for a beneficiary to establish a direct causal connection between the accident and the injury. He is compelled to show that the resultant condition was caused solely by accidental means; and if the proof shows a pre-existing infirmity which was a contributing factor, he cannot recover. *This holding is dictated by the express terms of the contracts under consideration.*" (Emphasis ours).

See also the case of *Russell v. Glens Falls Indemnity Co.*, 134 Neb. 631, 279 N.W. 287, where the court said: "It seems reasonably clear that a policy with the phrase 'resulting directly, independently and exclusively' refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase 'wholly or partly, directly or indirectly, from disease or mental or bodily infirmity' refers to another contributory cause, whether proximate or remote."

The following cases support this rule, many of which were cited in appellant's previous briefs. Our research has found substantial no authority to the contrary:

Evans v. Metropolitan Life Ins. Co.,
26 Wash. (2d) 594,
174 P. (2d) 961;

Liberty Nat. Life Ins. Co. v. Bailey,
— Ala. —,
38 So. (2d) 295;

Sullivan v. Metropolitan Life Ins. Co.,
96 Mont. 254,
29 P. (2d) 1046;

Kingsland v. Metropolitan Life Ins. Co.,
97 Mont. 558,
37 P. (2d) 335;

Federal Life Ins. Co. v. Firestone,
159 Okla. 228,
15 P. (2d) 141;

*Great Northern Life Ins. Co. v. Farmers Union Co-
Operative Gin Co.*,
181 Okla. 228,
73 P. (2d) 1155;

Kellner v. Travelers' Ins. Co.,
180 Cal. 326,
181 P. 61;

Bouchard v. Prudential Ins. Co.,
135 Me. 238,
194 A. 405;

O'Meara v. Columbian Nat. Life Ins. Co.,
119 Conn. 641,
178 A. 357;

Clark v. Employers' Liability Assur. Co.,
72 Vt. 458,
48 A. 639;

Runyon v. Commonwealth Casualty Co.,
109 N.J.L. 238,
160 A. 402;

Korff v. Travelers' Ins. Co.
83 F. (2d) 45;

Sharpe v. Com. Trav. Mut. Acc. Ass'n.,
139 Ind. 92,
37 N.E. 353;

Hubbard v. Travelers' Ins. Co.,
98 F. 932;

Carr v. Pac. Mut. Life Ins. Co.,
100 Mo. App. 602,
75 S.W. 180;

White v. Standard Life & Accid. Ins. Co.,
95 Minn. 77,
103 N.W. 735;

Nat'l. Masonic Acc. Ass'n. of Des Moines v. Shryock,
73 F. 774;

Stanton v. Travelers' Ins. Co.

83 Conn. 708,

78 A. 317;

Comm. Travelers' Mut. Acc. Ass'n. v. Fulton,

79 F. 423;

Leland v. Order of United Comm. Travelers,

233 Mass. 558,

124 N.E. 517;

First Natl. Bk. of Birmingham v. Equit. Life,

Assur. Soc.,

225 Ala. 586,

144 So. 451;

Mutual Life Ins. Co. v. Hess,

161 F. (2d) 1;

Standard Accid. Ins. Co. v. Hoehn,

215 Ala. 109,

110 So. 7;

Fid. & Cas. Co. v. Meyer,

106 Ark. 91,

152 S.W. 995;

The reasoning and application of this rule is firmly grounded upon the duty of the courts to construe the exception of exclusion provisions of an insurance contract as well as the general insuring clause, as is noted in *Boucharde v. Prudential Ins. Co.*, 135 Me. 238, 194 A. 405, 407;

“It is argued by plaintiff's counsel that the encounter was the proximate cause; but in this action, founded upon this specific promise, (exception clause), it is not a question of what was the proximate cause of deceased's death. The contract itself clearly creates liability only when death results from

bodily injuries effected solely through accidental means. * * * * Quite true it is that very often different forces and conditions concur in producing a result that it is not necessary to go farther back in the line of causation than to find the active, efficient, procuring cause known as the proximate cause. In the instant case the blows might well have been said not permit recovery under the language of this policy, that cause, although proximate, being accompanied by another contributing cause, the diseased heart. ** *** So, when the death is attributable directly or indirectly to disease in any form, not occasioned by the accident, recovery may not be had on a policy containing this particular promise, even though the accident is the active, efficient, procuring cause."

Examination of the cases which seem to be to the contrary clearly indicates that a body weakness is involved and the courts have referred to the same as a condition. For example, in the case of *Driskell v. U. S. Health & Accident Co.*, 117 Mo. App. 362, 93 S.W. 880, the court said: "In such case, disease and low vitality do not arise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

So, likewise, in *Runyon v. Commonwealth Cas. Co.*, 109 N.J.L. 238, 160 A. 402, the court found: "There was a reduction in the power of the body at the time of the fracture to resist the shock" and said: "It was the direct result of the accident, which might or might not have been fatal had not the bodily vitality been impaired".

In *Silverman v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914, the court again said that where there was merely a "frail, general condition", there may be recovery.

Certainly in the case at bar, the thrombosis cannot be said to be merely a lowering of the vitality of the insured, but definitely a cooperating cause, because there is no conflict in the testimony, including the insured's family physician, that the insured was suffering from thrombosis which caused an embolism. Respondent's witnesses testified to the thrombosis and the diseased venous system as being a bodily infirmity. Almost without exception, the courts have held that bodily infirmity or disease have a well settled meaning as understood by the medical profession. The words "bodily infirmity or disease" are frequently used in policies of insurance and have a well-understood meaning. They are construed to be practically synonymous, and to refer only to an ailment or disease of a settled character. I.C.J. 452; 4 Cooley's Briefs on Ins. p. 3198; *Meyer v. Fidelity & C. Co.*, 96 Iowa 378, 59 Am. St. Rep. 374, 65 N.W. 328; *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C.C.A. 6th) 22 L.R.A. 620, 7 C.C.A. 581, 16 U. S. App. 290, 58 Fed. 945. Certainly the facts in this case bring it within this rule. No authority is needed to show that a court may not disregard undisputed evidence which conclusively brings the factual situation within the exceptions of an insurance policy. Neither is the court at liberty to fail to give heed to such exception clause as is well said in the recent case of *Mutual Life Ins. Co. v. Hess*, 161 F. (2d) 1, 14:

"Applying to these facts the words of the policy, if water involuntarily entered his lungs, preventing

breathing, which is the usual case of drowning, there would be a 'bodily injury', and the entry of the water would be an 'external' and violent means' within the policy terms, and since death followed in sixty days with nothing to suggest suicide, there would be a case made but for the words 'solely', 'independently of all other causes', and 'not directly or indirectly from bodily infirmity or disease'. *These words cannot be thrown away. They limit the coverage of the insurance. A court can no more extend the coverage than it can increase the amount of the insurance. Deliberately to do either would be a sort of judicial larceny.* Here the evidence points very strongly to another cause of death, a bodily infirmity or disease, active and threatening, adequate to produce death by itself, and likely to cooperate with the water in causing it." (Emphasis ours).

How else would a litigant prove the existence of a bodily infirmity or disease? Or that the same caused the embolism, excepting by medical testimony? An examination of many of the cases shows that there is often a conflict between the expert witnesses as to whether a contributing cause, or causes, constitute bodily infirmity or disease. Here, there is no conflict in the testimony in this regard. Certainly respondent showed that the thrombus had existed for a substantial period of time as the residue of a prior operation, and that it was a bodily infirmity of a settled and determined character. Respondent's witnesses also testified that such pre-existing infirmity cooperated directly, or indirectly, resulting in the death of the insured. As heretofore noted, respondent herself proved not only that insured and his physician knew the condition of the insured at the time of the operation, his habits, and his ac-

tions when asleep, and that he had a pre-existing bodily infirmity and disease which might cause death with even a slight cough at any time.

We have endeavored to analyze the *Browning*, *Idaho*, and other cases cited in the opinion. Even the cases referred to in the A.L.R. citation (108 A.L.R. 1, p. 21, opinion p. 4) are not contrary to the principles of law urged by us in our briefs. These cases, and in the subsequent annotations, are readily distinguishable, either by the terms of the policy or the facts involved; some include coverage if the accident is "the proximate cause of the loss", which of course changes the contractual relationship; some are distinguished by the fact that the court or jury was presented with conflicting evidence as to the cause of the loss; some did not include the exclusion clause; none indicated a rule contrary to those heretofore urged as controlling in the instant case; none appeared to permit the court to disregard undisputed evidence to prevent the cases from being brought within the exclusion clauses of the policy.

There is nothing in the *Idaho* law, and this court has not cited any *Idaho* statute or case, to require this court to apply Workmen's Compensation Laws, or the laws of negligence to the construction of insurance contracts, or to require a construction thereof to the end that recovery be "permissible" despite the uncontradicted evidence and the principles of law heretofore announced by this court and the vast majority of other well reasoned cases; nor is there anything in the *Idaho* law to require this court to reverse the rule applied by it in the *Jensma* case and designate a

an accident or unexpected, that of which neither insured nor his physician were ignorant, nor to ignore the testimony of all medical witnesses that the pre-existing disease and infirmity was a cooperating cause.

This court has not, to our knowledge, heretofore announced principles governing insurance contracts such as indicated in its opinion herein, nor brushed aside the uncontradicted testimony of bodily infirmity, knowledge of peculiarity of actions during sleep exactly identical with ordinary life whether sleep was induced by sedative or otherwise, thrombosis causing embolism, and the settled and determined bodily infirmity or disease as a cooperating cause. The opinion can only be explained on the basis of making what the court attributed to the Browning case, the law of Idaho, and the assumption that the Supreme Court of Idaho allowed recovery against insurance companies wherever permissible. Such premises cannot be sustained as we have heretofore pointed out, and a rehearing should be granted.

Respectfully submitted,

J. L. EBERLE,

B. S. VARIAN,

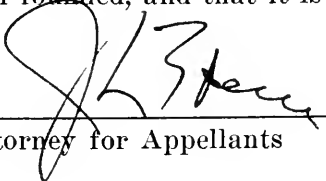
DALE O. MORGAN,

T. H. EBERLE,

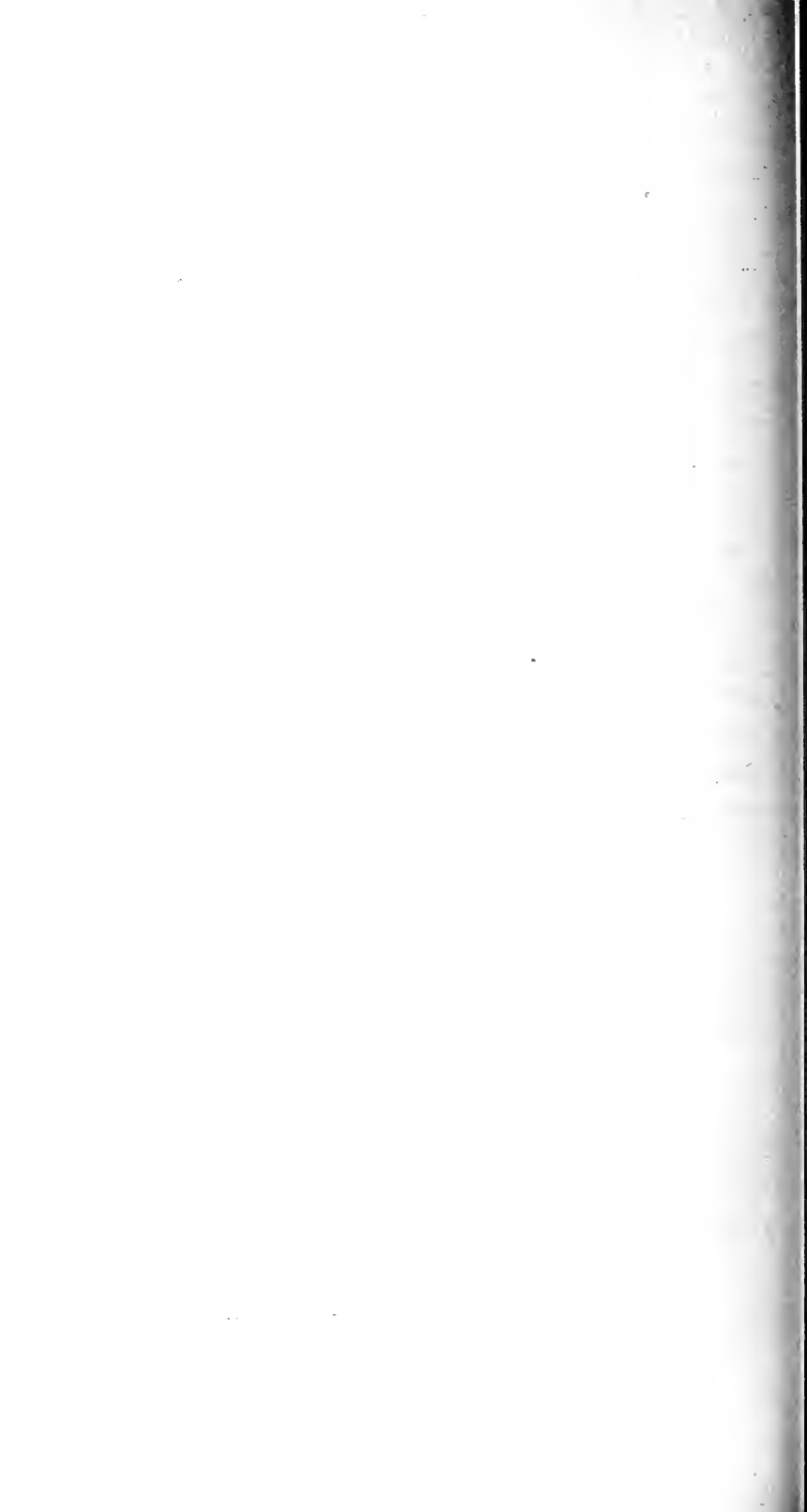
Attorneys for Appellant,

Residence: Boise, Idaho.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.



Attorney for Appellants



No. 12228

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, De-
ceased, JESSE KOSHLAND, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED
JUN 15 1949



No. 12228

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, De-
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of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

SAMUEL TAYLOR, Esq.,
EDGAR SINTON, Esq.,
BERNARD SHAPIRO, Esq.

For Respondent:

A. J. HURLEY, Esq.

Docket No. 13780

Estate of ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

May 5—Petition received and filed. Taxpayer notified. Fee paid.

May 6—Copy of petition served on General Counsel.

May 5—Request for Circuit hearing in San Francisco, California, filed by taxpayer. 5/21/47 Granted.

June 10—Answer filed by General Counsel.

June 10—Request for hearing in San Francisco, California, filed by General Counsel.

June 12—Copy of answer and request served on taxpayer. San Francisco, Calif.

1948

Jan. 26—Hearing set March 22, 1948, in San Francisco, California.

Mar. 23—Hearing had before Judge Kern on merits. Appearance of Bernard Shapiro as counsel filed. Stipulation of facts with Exhibits A through D; Amended petition (copies served); Answer to Amended petition (copies served) filed at hearing. Petitioner's brief due 5/7/48. Respondent's brief 6/7/48. Petitioner's reply due 7/7/48.

Apr. 12—Transcript of hearing 3/23/48 filed.

May 5—Motion to amend record to include the attached stipulation of facts—stipulation of facts lodged, filed by taxpayer. 5/6/48 Granted.

May 5—Brief filed by taxpayer. Copy served.

June 11—Motion for leave to file the attached brief, brief lodged, filed by General Counsel 6/18/48 Granted and served.

June 28—Motion for extension to 7/22/48 to file reply brief, filed by taxpayer. 6/28/48 Granted and served.

July 16—Motion for extension to 8/22/48 to file brief, filed by taxpayer. 7/16/48 Granted and served.

Aug. 16—Reply brief filed by taxpayer. Copy served 8/17/48.

948

Nov. 30—Findings of fact and opinion rendered, Judge Kern. Decision will be entered under Rule 50. 12/1/48 Copies served.

Dec. 27—Motion to amend and supplement findings of fact, embodying amendment, filed by taxpayer. 1/5/49 Denied.

949

Jan. 6—Copy of motion and amendment served on General Counsel. [1*]

Jan. 19—Computation filed by General Counsel.

Feb. 3—Hearing set March 7, 1949, on settlement—Washington, D. C.

Feb. 11—Notice changing hearing date to March 9, 1949.

Feb. 14—Consent to respondent's computation filed by taxpayer.

Feb. 25—Decision entered. Judge LeMire. Div. 5.

Mar. 21—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.

Mar. 23—Designation of record filed by taxpayer. Service acknowledged thereon.

Mar. 25—Statement of points filed by taxpayer.

Apr. 14—Proof of service of designation of contents of record on review filed.

Apr. 14—Proof of service of statement of points filed. [2]

* Page numbering appearing at foot of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 13780

Estate of ABRAHAM KOSHLAND, Deceased;
JESSE KOSHLAND, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols, San Francisco Division, IRA:ET-90-D LAB, and dated April 7, 1947 and as a basis of its proceeding alleges as follows:

1. The petitioner is an estate of a decedent. The decedent, Abraham Koshland, died on April 15, 1944, and his estate is being probated in the Superior Court of the State of California, in and for the City and County of San Francisco. Jesse Koshland is the duly appointed, qualified and acting executor of said estate.

2. The notice of deficiency (a copy of which is attached to the original petition filed in this case as [3] Exhibit A, and is incorporated by reference in and made a part of this amended petition as Exhibit A) was mailed to petitioner on or about April 7, 1947.

3. The amount of the deficiency determined by the Commissioner is \$49,062.25 in estate tax. All of

said amount is in controversy. The petitioner is claiming a refund in estate tax and said claim for refund is in controversy. The estate tax return of petitioner was filed with the Collector of Internal Revenue for the first district of California, in San Francisco, California, on or about May 24, 1945.

4. The determination of the tax set forth in said notice of deficiency and the refusal of the Commissioner to allow said claim for refund are based upon the following errors:

(1) The Commissioner erred in including in the gross estate the value of the remainder interest in a trust created by the petitioner on or about December 26, 1922 (Exhibit B), and amended by petitioner on or about December 26, 1923 (Exhibit C).

(2) The Commissioner erred in determining the value of the life estate of Estelle W. Koshland in said trust, which life estate he excluded from the gross estate. The Commissioner undervalued said life estate. [4]

(3) The Commissioner erred in determining the value of said remainder interest in said trust, which remainder interest he erroneously included in the gross estate. Assuming that the remainder interest was includable in the gross estate, the Commissioner, by undervaluing the life estate of said Estelle W. Koshland, overvalued said remainder interest.

(4) The Commissioner erred in not allowing to the petitioner full credit for state inheritance, estate, legacy and succession taxes paid or payable.

(5) The Commissioner erred in not allowing to

the petitioner a deduction from the gross estate for legal fees payable as a result of this proceeding.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) On or about December 26, 1922, the decedent created a trust by transferring certain securities to Jesse Koshland and Stanley H. Sinton, who declared themselves trustees thereof. A true and correct copy of said trust is attached to the original petition filed in this case as Exhibit B, and is incorporated by reference in and made a part of this amended petition as Exhibit B.

(2) On or about December 26, 1923, the decedent amended said trust. A true and correct copy of said amendment is attached to the original petition filed in this case as [5] Exhibit C, and is incorporated by reference in and made a part of this amended petition as Exhibit C.

(3) At the time of the creation of said trust as Exhibit B, and for many years prior thereto and for the period subsequent thereto until April 15, 1944, the date of his death, the decedent, Abraham Koshland, and Estelle W. Koshland were husband and wife.

(4) The decedent, Abraham Koshland, was born on March 22, 1869, and died on April 15, 1944. He was 75 years of age at the time of his death. Estelle W. Koshland was born April 8, 1878, and is still living. She was 66 years of age at the date of decedent's death.

(5) The decedent and Estelle W. Koshland had two children, Stephen A. Koshland, who was born

on February 21, 1902, and was 42 years old at the date of his father's death, and William A. Koshland, who was born on November 9, 1906, and was 37½ years old at the date of the death of his father. Both children are still living. William A. Koshland never married. Stephen A. Koshland married on April 14, 1938, and his wife is still living and married to him. They have had two children, Anthony S. Koshland born on March 26, 1940, who was four years old at the time of decedent's death, and Kathryn Koshland born on July 16, 1943, who was under one year of age at the time of decedent's death. Both of said children are still living. [6]

(6) Both Stephen A. Koshland and William A. Koshland had executed valid wills prior to the death of their father. Each of said wills appointed the property covered by said trust (Exhibit B) as amended by Exhibit C, to persons other than their father and his estate.

(7) Estelle W. Koshland under paragraph Fourth (a) of said trust, Exhibit B (quoted below), was and is entitled to an annual income of \$15,000 for life, payable out of the income of said trust to the extent that there is income available and out of the principal of said trust if the income is insufficient.

“Fourth: At any time or during any period when no income is received, or where the income received is less than Fifteen Thousand (15,000) Dollars in any year, the Trustees may, upon the application of any beneficiary, apply and expend such part of the principal of the fund as may be necessary:

(a) To provide either the said Estelle W. Koshland or the said Abraham Koshland with an income of Fifteen Thousand (15,000) Dollars for such year;”.

(8) The value of the life estate of Estelle W. Koshland as of the date of Abraham Koshland's death, April 15, 1944, was \$170,236.95. The value of the remainder of said trust as of said date was \$61,287.69. The Commissioner in his deficiency notice Exhibit A, [7] based the value of said life estate on an annual income of \$9,260.99 and upon a Table A factor for a one dollar annuity at age 66 of 7.52476, and upon a factor for quarterly payment of 1.01488. The use of said Table A factor and said factor for quarterly payments are provided for in Regulations 105, Section 81.10(i). Said Table A which is a part of said section, is based on the Actuaries' or Combined Experience Table of Mortality. Said Actuaries' or Combined Experience Table is and was as of April 15, 1944, obsolete. Said factor for quarterly payments is actuarially unsound. The value of said life estate of Estelle W. Koshland as of said date of death, to wit, \$170,236.95, is properly determined on an annual income of \$15,000 a year and by using a factor (which includes the element of quarterly payments) for one dollar annuity for a female age 66 of 11.3491. Said determination is based upon a 4 per cent interest rate, the same as the interest rate used by the Commissioner in the deficiency notice, Exhibit A.

(9) The petitioner has paid and will be required

to pay state inheritance, estate, legacy and [8] succession taxes in an amount in excess of the sum of \$17,699.97, the amount for which credit for said taxes has been allowed by the Commissioner. The petitioner is entitled to the full 80 per cent credit against the estate tax for said taxes paid and payable.

(10) The petitioner, as a result of this proceeding, will incur and pay legal fees in an amount as yet undetermined, but which will be determined prior to the entry of a decision in this proceeding. The petitioner may, if said decision is appealed by either itself or the Commissioner, incur and pay in connection with said appeal additional legal fees in an amount as yet undetermined but which will be determined before said decision becomes final. Said fees are deductible from the gross estate.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in estate tax due from said petitioner, and that there is a refund in estate tax due to said petitioner in an amount determined by deducting from the gross estate the [9] legal fees to be paid by petitioner as a result of this proceeding and of any appeal which may be taken from the decision of the Court therein, and further determined by allowing the full 80 per cent credit against the estate tax for the amount of the state inheritance, estate, legacy and succession taxes paid or payable, and in the alternative, should this Court determine that the remainder interest in said trust, Exhibit B, as amended by Exhibit C, is includable in the gross

estate, that it may determine that the value of the life estate of said Estelle W. Koshland which is excludable from the gross estate is \$170,236.95 and that the value of said remainder interest is \$61,287.69 and that it may grant such further relief as to it may seem proper.

Dated: San Francisco, California, March 15th 1948.

Respectfully submitted,

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON.

[Endorsed]: T.C.U.S. Filed March 23, 1948. [10]

State of California,

City and County of San Francisco—ss.

Jesse Koshland, being first duly sworn, depose and says:

He is the duly appointed, qualified and acting executor of the Estate of Abraham Koshland, deceased, the petitioner named in the foregoing amended petition; he has read the said amended petition and is familiar with the statements contained therein, and said statements are true.

/s/ JESSE KOSHLAND.

Subscribed and sworn to before me this 15th day of March, 1948.

/s/ LULU P. LOVELAND,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires August 27, 1951. [11]

EXHIBIT "A"

Form 1279

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Office of Internal Revenue Agent in Charge
San Francisco Division
IRA: ET-90-D LAB

April 7, 1947

Estate of Abraham Koshland, Deceased
Jesse Koshland, Executor
c/o Edgar Sinton
1650 Russ Building
San Francisco, California

MT-ET-16120 First California
Estate of Abraham Koshland
Date of death—April 15, 1944

Dear Mr. Koshland:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of \$49,062.25, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this let-

Exhibit "A"—(Continued)

ter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

/s/ JOSEPH D. NUNAN, JR.,

Commissioner,

By /s/ F. M. HARLESS,

Internal Revenue Agent in Charge

Enclosures: RR Statement Form. [12]

ESTATE TAX

Statement

	Liability	Assessed	Deficiency
Estate Tax	\$174,374.77	\$125,312.52	\$49,062.25

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest filed March 8, 1946, and to statements made at conferences held on May 29, 1946, and on November 18, 1946.

Exhibit "A"—(Continued)

A copy of this letter has been mailed to your representative, Mr. Samuel Taylor, 406 Montgomery Street, San Francisco, California.

Adjustments to Net Estate

Net estate for basic tax as disclosed by the return:

Gross estate	\$568,412.27
Deductions	136,938.97

Net estate	\$431,473.30
------------------	--------------

Additions in value of net estate and decreases in deductions:

(a) Stocks and bonds, Schedule B of return	\$ 225.00	
(b) Transfers, Schedule G of return	\$160,800.97	\$161,025.97
		<hr/>
		\$592,499.27

Reduction in value of net estate and increases in deductions	0.00
--	------

Net estate for basic tax as adjusted.....	\$592,499.27
Net estate for additional tax as adjusted	\$632,499.27

Explanation of Adjustments

	Returned	Determined
(a) Stocks and bonds, Schedule B of return		
Item 6—\$4,000.00 Par Value Lehigh Coal and Navigation Co. Cons. 4½% bonds due January 1, 1954.....	\$ 4,120.00	\$ 4,125.00
Item 19—\$5,000.00 Par Value United States Savings Defense Series g-2½% bonds due September 1, 1953.....	\$ 4,780.00	\$ 5,000.00
	<hr/>	<hr/>
Totals	\$ 8,900.00	\$ 9,125.00
Net Increase	\$ 225.00	

The finally determined value of items 6 and 19, as above listed, are based upon the means between the

Exhibit "A"—(Continued)

high and low stock exchange sales prices on the applicable valuation date, in accordance with the provisions of Section 81.10 (c) of Treasury Regulations 105.

	Returned	Determined
(b) Transfers during decedent's life		
Schedule G of return	\$ 0.00	\$160,800.97

The value of the remainder interest in that certain Trust created by decedent as grantor on December 26, 1922, and amended under date of December 26, 1923, is included in the gross estate, it being determined that such transfer was one in which decedent reserved the power to alter, amend, or revoke, and is subject to inclusion in the gross estate under the provisions of section 81.20(b)(1), of Treasury Regulations 105, and that said transfer was intended to take effect at or after decedent's death and is subject to inclusion in the gross estate under the provisions of section 81.17, Regulations 105, as amended.

The portion of the trust assets includable in the gross estate is computed as follows: [14]

Fair market value of trust estate 4-15-1944		\$231,524.64
Less—value of life estate held by Estelle Koshland: Date of birth, 4-8-1878—Age 4-15-1944, 66 years		
Annual income on \$231,524.64 at 4% \$	9,260.99	
Table A factor for \$1.00 annuity at 66..	7.52576	
Annuity value of annual income		
(7.52476 of \$9,260.99)	\$ 69,686.73	
Factor for quarterly payments.....	1.01488	
Value of life tenancy 4-15-1944		
(1.01488 of \$69,686.73)		70,723.67
Value of trust includible in gross estate		\$160,800.97

Exhibit "A"—(Continued)

Computation of Estate Tax

	Returned	Determined
Gross estate	\$568,412.27	\$729,438.24
Deductions (basic tax)	136,938.97	136,938.97
Net estate for basic tax	\$431,473.30	\$592,499.27
Net estate for additional tax	471,473.30	632,499.27
Gross basic tax	\$ 22,124.96	
Credit for state inheritance, etc. tax.....	17,699.97	
Net Basic Tax		\$ 4,424.99
Total gross taxes basic and additional....	\$192,074.74	
Gross basic tax	22,124.96	
Net additional tax		\$169,949.78
Total tax payable		\$174,374.77
Tax shown on return and previously assessed		125,312.52
Deficiency		\$ 49,062.25

EXHIBIT "B"

"THE ABRAHAM KOSHLAND TRUST"
DECLARATION OF TRUST

Know All Men by These Presents, that we, Jesse Koshland and Stanley H. Sinton of Boston in the County of Suffolk and Commonwealth of Massachusetts, hereinafter called the Trustees,

Acknowledge, that we have received from Abraham Koshland the following securities, to wit:

50 Shares Anglo London-Paris Natl. Bank.

200 Shares Natl. Shawmut Bank.

405 Shares American Woolen Co., Pfd.

Exhibit "B"—(Continued)

200 Shares Atchison Topeka & Santa Fe Railway Co.

60 Shares Norfolk & Western Railway Co.

200 Shares Northern Pacific Railway Co.

100 Shares Southern Pacific Railway Co.

100 Shares Pacific Oil Company.

100 Shares Narragansett Electric Lighting.

200 Shares Union Pacific R. R. Co.

\$10,000 6% Bonds of the New York Telephone, Debenture, 1949, numbered 3726-35 incl.

\$20,000 4% Bonds of the Reading Co. & Phila. & Reading Coal Co., 1997, numbered 90266-73 incl., 86853, 86854, 86902, 91274-9 incl. and 80233-5 incl.

\$10,000 4% Bonds of the Southern Pacific RR 1st Ref., 1955, numbered 12348-53 incl., 10184, 91723, 31980, 20543.

\$10,000 4% Bonds of the Central Pacific Co. 1st Ref., 1949, 19429, 79101, 66850-2 incl., 71444-5 incl., 16777, 17501, and 56525.

\$5,000 5% Bonds of the Brooklyn Union Elevated, 1950, numbered 11333-4 incl., 12282, 5047 and 2956.

\$4,000 5% Bonds of the Indiana Steel Co., 1952, numbered 87-8 incl., 8948-9 incl.

\$3,000 5% Bonds of the Ontario Light & Power Co., numbered 11-13 incl.

\$5,000 6% Bonds of the Reno Light & Power Co., numbered 149/53 incl.

\$2,000 6% Bonds of the Rincon Warehouse Co., numbered 289-92 incl. [16]

Exhibit "B"—(Continued)

which together with such other property as may hereafter be acquired or received by us under the terms hereof, we hereby acknowledge, covenant, agree and declare that we hold for the purposes, uses, and trusts and subject to the powers, terms, limitations and duties herein set forth:

First: The Trustees shall have full power and authority at all times to invest and to reinvest the principal of the fund, either in reality or personalty and generally to manage, improve, care for and control the same with all the powers necessary or convenient for such purposes. Without in any way limiting the generality of the foregoing, the Trustees shall have the following powers:

(a) To sell, exchange or transfer any or all and any part or parts of the said principal upon such terms and conditions and in such manner and form as they may deem best, and to execute, acknowledge, deliver and record any deed, contract, proxy, power of attorney, or other instrument relating to the same which they may deem necessary or advisable, and no purchaser, transferee or other person dealing with the Trustees with regard to said principal shall be held to see to the application of money or property paid to the Trustees;

(b) To lease or to manage any or all and any part or parts of the real estate at any time held by them hereunder upon such conditions and on such terms as they deem best;

(c) To mortgage any real estate, or to hypothecate any personal property or otherwise to borrow

Exhibit "B"—(Continued)

money at any time held by them hereunder, to such an extent and upon such terms and conditions as they shall deem best; [17]

(d) To determine all questions whether any money or things coming into their possession shall be treated as principal or income, and to determine the mode in which the expenses incidental to or in connection with the execution of the trust ought to be borne as between principal and income, and to apportion the same as they shall deem just and equitable, and this power shall include, without the generality thereof being hereby restrained, the power to determine in case any investment shall at any time be made at a premium in any bond or security for money or in any wasting investment so called, whether and to what extent and in what manner any part of the actual income of such bond, security or other investment shall be dealt with as principal with a view to prevent the diminution of the trust, and also the power to establish and maintain, in such manner and to such extent as they deem necessary or proper, a sinking fund, or sinking funds to provide for payment or reduction of any mortgage upon any real estate at any time held by them hereunder.

The Trustees may retain in the form received any property, stock, bond or other security given to them hereunder as long as they deem advisable without being liable to any person for such retention.

The Trustees are fully authorized to exercise the powers or authority, whether discretionary or other-

Exhibit "B"—(Continued)

wise, herein given to them through agents or employees appointed by them, and to select and employ suitable agents and employees in and about the execution of the trust, and to pay them reasonable compensation and [18] expenses and also retain reasonable compensation for their own services not to exceed five (5) per cent per annum of the gross income.

The Trustees shall in no event be held liable for any neglect or wrong doing of each other or of such agent or employee provided said trustees exercise good faith in their selection, nor shall the trustees herein be liable for any loss unless it should happen through their own wilful default or neglect.

Second: For and during the lifetime of Estelle W. Koshland of said Boston the income of this trust less proper charges and deductions including the payment of such taxes, municipal, state or Federal as may be levied thereon, shall be paid over unto her semi-annually, quarterly or oftener for and during her lifetime and upon her death then said income shall be paid over unto Abraham Koshland of said Boston, semi-annually, quarterly or oftener for and during his lifetime, and upon the death of the survivor of the said Estelle W. Koshland, and the said Abraham Koshland, said fund shall be divided into two equal parts, and one of said parts shall be held for the use and benefit of each of Stephen A. Koshland and William A. Koshland, sons of the said Estelle W. Koshland and the said Abraham Koshland, upon the following terms

Exhibit "B"—(Continued)

and conditions, to wit: the income to be paid to the guardian of a son during his minority and upon such son attaining the age of twenty-one (21) to pay the said income to him for and during his lifetime. At any time after a son shall have attained the age of twenty-one (21) to pay over to such son from time to time such proportion of the principal of such trust fund as the Trustees may deem best, but not more than one-third ($1/3$) of such principal shall be advanced to [19] him before he reaches the age of thirty (30) years, the balance of the principal may be paid over to him after he attains the age of thirty (30).

Upon the death of a son, to pay over the principal of his share of this fund to the lawful issue of such son in such proportion and such manner and upon such terms as he may by any last will or testamentary instrument direct, and in default of such direction, then to and amongst his issue, or if he leave no issue, then to and amongst such other persons as he shall by any last will or other testamentary instrument direct, and in default of such direction, then to and amongst his heirs-at-law.

Third: Neither said Stephen A. Koshland nor said William A. Koshland shall have any right to anticipate payments of income, nor shall the said Stephen A. Koshland or the said William A. Koshland have any right to assign or transfer any part of the fund or income therefrom to which he may be entitled hereunder, and if any such assignment shall be made, whether voluntary or involuntary,

Exhibit "B"—(Continued)

then in the discretion of the Trustees all right of such assignor may be determined and the share of such beneficiary disposed of in the same manner as if the beneficiary had died at the date of such assignment.

The Trustees shall exercise uncontrolled discretion if in their judgment at any time it is deemed undesirable to pay over the income to any one of the sons of said Estelle W. Koshland and Abraham Koshland to withhold the same and in that event they are authorized under the terms herein to expend the same or any part thereof for the benefit of the sons so entitled to such income, [20] or they may allow such income or any unexpended part thereof to accumulate and add the same to the principal of said fund held for the benefit of such son.

Fourth: At any time or during any period when no income is received, or where the income received is less than Fifteen Thousand (15,000) Dollars in any year, the Trustees may, upon the application of any beneficiary, apply and expend such part of the principal of the fund as may be necessary:

(a) To provide either the said Estelle W. Koshland or the said Abraham Koshland with an income of Fifteen Thousand (15,000) Dollars for such year;

(b) To provide any one of the children of said Estelle W. Koshland and Abraham Koshland with an income of Five Thousand (5,000) Dollars for such year.

Fifth: Upon the death or resignation or inability of the said Jesse Koshland and the said Stanley H.

Exhibit "B"—(Continued)

Sinton to act as Trustees for a period of six (6) months, certified to by the beneficiaries, a new Trustee may be appointed upon the nomination of the said Abraham Koshland for and during his lifetime, and after his death then by the nomination of the said Estelle W. Koshland for and during her lifetime and after the death of the said Estelle W. Koshland and the said Abraham Koshland, then upon the nomination of the two beneficiaries. A written nomination or appointment of such new trustee shall be filed with this Agreement and Declaration of Trust and the new appointee shall in writing accept and upon such written acceptance of his appointment, and [21] the filing thereof with the nomination, shall thereupon, without any further act or conveyance, be vested with all the rights and powers of a Trustee, and subject to all the obligations and duties herein imposed.

Sixth: The Trustees shall keep proper books of account, showing their receipts and disbursements which shall at all reasonable times be open to the inspection of the beneficiaries.

Seventh: Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland, with the approval of the Trustees hereof, at any time in his uncontrolled discretion to amend this Declaration of Trust in any manner whatever, and expressly including the right to limit or change the beneficiaries herein or the share or proportion of any beneficiary.

Eighth: Power is hereby reserved, during th

Exhibit "B"—(Continued)

lifetime of said Abraham Koshland, and given to the said Abraham Koshland at any time in his uncontrolled discretion to terminate this trust and upon such termination, the principal and undistributed income then in the hands of the Trustees shall be distributed to and amongst such person or persons as he shall direct by a written instrument addressed to the Trustees and authority is expressly reserved to the said Abraham Koshland to direct and designate himself as the person entitled to such distribution either in part or in whole of said fund.

Ninth: Each and every one of the powers, purposes and provisions hereof, except as otherwise provided, shall be regarded as separate and distinct from every other power, purpose [22] and provision so that no one shall be limited by reference to or inference from any other, and the enumeration of specific purposes and powers shall not be construed to limit or restrain in any manner the meaning of general terms. If a court of last resort shall decree that any of the powers, purposes, or provisions hereof are invalid, this shall not in any wise limit any other power, purpose or provision hereinbefore granted, but only such power, purpose or provision so decreed to be invalid shall be limited, and all other powers, purposes and provisions herein granted, shall be unmodified thereby.

Tenth: Unless requested in writing by the beneficiaries neither the original Trustees nor any successor Trustee or Trustees shall be required to give surety or sureties upon a bond for the faithful per-

Exhibit "B"—(Continued)

formance of the trust hereby imposed upon them; but upon such written request of the beneficiaries, the Trustees shall, at the expense of the Estate, furnish a surety Company bond conditional on the faithful performance of their duties as Trustees in a sum not less than the amount of the fund.

Eleventh: The Old Colony Trust Company of Boston is hereby named as the depository with whom this Declaration of Trust shall be filed and authority is hereby given to the Trustees to change the depository and from time to time designate the successor depository.

Twelfth: This Trust shall be designated as The "Abraham Koshland Trust."

In Witness Whereof we hereunto set our hands and seals [23] this 26th day of December, 1922, to this instrument executed in five (5) duplicate original copies.

/s/ JESSE KOSHLAND

/s/ STANLEY H. SINTON.

Commonwealth of Massachusetts,
Suffolk—ss.

December 26th, 1922

Then personally appeared Jesse Koshland and Stanley H. Sinton and acknowledged the foregoing to be his free act and deed.

Before me,

(Seal) /s/ THOMAS H. DUCEY,
Notary Public.

My commission expires March 29, 1923.

[Endorsed]: T.C.U.S. Filed Mar. 23, 1948. [24]

EXHIBIT "C"

ABRAHAM KOSHLAND TRUST
MEMORANDUM OF DECLARATION OF
TRUST

Whereas by a certain Declaration of Trust dated December 26, 1922, Jesse Koshland and Stanley H. Sinton acknowledged the receipt of certain securities from Abraham Koshland of Boston, in the County of Suffolk of Commonwealth of Massachusetts, upon the terms in said Declaration of Trust contained, which amongst other things provided Article 7 and Article 8, as follows:

"Seventh": Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland, with the approval of the Trustee hereof, at any time in his uncontrolled discretion to amend this Declaration of Trust in any manner, whatever, and expressly including the right to limit or change the beneficiaries herein or the share or proportion of any beneficiary.

"Eighth: Power is hereby reserved, during the lifetime of said Abraham Koshland, and given to the said Abraham Koshland at any time in his uncontrolled discretion to terminate this trust and upon such termination, the principal and undistributed income then in the hands of the Trustees shall be distributed to and amongst such person or persons as he shall direct by a written instrument addressed to the Trustees, and authority is expressly reserved to the said Abraham Koshland to direct and designate himself as the person entitled

Exhibit "C"—(Continued)

to such distribution either in part or in whole of said fund."

Now, Therefore, Know All Men by These Presents that I, Abraham Koshland, by virtue of the power to me given by said provisions and any other provisions of said Declaration of Trust me hereunto enabling, do hereby amend said Declaration of Trust in the following manner and particulars, to wit:

I do hereby amend said Declaration of Trust by cancelling said Articles 7 and 8 and substitute in place thereof the following Articles 7 and 8, which said new articles shall be incorporated [25] in said original Declaration of Trust and be of the same force and effect as if originally written in and made part of the original Declaration of Trust in place of the Articles 7 and 8 as originally written:

"7. Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland and Estelle W. Koshland with the approval of the Trustees hereof at any time in the uncontrolled discretion of the said Abraham Koshland and Estelle W. Koshland to amend the declaration of Trust, and if during the lifetime of the said Abraham Koshland the said Estelle W. Koshland shall not be living, then any one of the sons of the said Abraham Koshland and the said Estelle W. Koshland, who is a beneficiary under the said Declaration of Trust, may exercise in conjunction with the said Abraham Koshland the power of amendment in place of, and in substitution for, said

Exhibit "C"—(Continued)

Estelle W. Koshland, with the same force and effect as if the son so joining in such amendment had been originally and specifically named in the place and stead of said Estelle W. Koshland.

8. This trust shall be irrevocable.

In Witness Whereof I, Abraham Koshland, hereunto set my hand and seal this 26th day of December, 1923.

(Seal) /s/ ABRAHAM KOSHLAND.

We, Jesse Koshland and Stanley H. Sinton, hereby acknowledge receipt of the within amendment to the Declaration of Trust made by us December 26, 1922, and approve of the same and hereby accept and agree to the same as part of the original Declaration of Trust under and in accordance with the provisions of the original Trust Instrument.

In Witness Whereof we hereunto set our hands and seals this 26th day of December, 1923.

(Seal) JESSE KOSHLAND

(Seal) STANLEY H. SINTON. [26]

Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended peti-

tion in the above proceeding, admits and denies as follows:

1 to 3, inclusive. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the amended petition.

4 (1) to (5), inclusive. Denies the allegations of error contained in subparagraphs (1) to (5), inclusive, of paragraph 4 of the amended petition.

5 (1) to (5), inclusive. Admits the allegations contained in subparagraphs (1) to (5), inclusive, of paragraph 5 of the amended petition.

(6) and (7). Denies the allegations contained in subparagraphs (6) and (7) of paragraph 5 of the amended petition. [27]

(8). Admits that the Commissioner in his deficiency notice Exhibit A, based the value of said life estate on an annual income of \$9,260.99 and upon a Table A factor for a one dollar annuity at age 66 of 7.52476, and upon a factor for quarterly payments of 1.01488, and that the use of said Table A factor and said factor for quarterly payments are provided for in Regulations 105, Section 81.10(i) denies the remaining allegations contained in subparagraph (8) of paragraph 5 of the amended petition.

(9) and (10). For lack of sufficient information as to the truth and correctness thereof, denies the allegations contained in subparagraphs (9) and (10) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.
Of Counsel:

B. H. NEBLETT,
Division Counsel,
T. M. MATHER,
A. J. HURLEY,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed March 23, 1948. [28]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby Stipulated by and between counsel for the petitioner and counsel for the Commissioner in the above-entitled case that the following facts may be taken as true in said case:

1. The petitioner is an estate of the decedent. The decedent, Abraham Koshland, died on April 15, 1944, and his estate is being probated in the Superior Court of the State of California, in and for the City and County of San Francisco. Jesse Koshland is the duly appointed, qualified and acting executor of said estate.

2. The notice of deficiency, a copy of which is attached to the petition in this case and incorporated

by reference herein as Exhibit A, was mailed to petitioner on or about April 7, 1947. [29]

3. The estate tax return of petitioner was filed with the Collector of Internal Revenue for the First District of California, in San Francisco, California, on May 24, 1945, and the amount shown as due thereon was paid to said Collector at said time. A true and correct copy thereof is attached hereto as Exhibit A(1) and incorporated by reference herein.

4. On December 26, 1922, the decedent, Abraham Koshland, created a trust by transferring certain securities to Jesse Koshland and Stanley H. Sinton, who declared themselves trustees thereof. A true and correct copy of said trust is attached to the petition in this case as Exhibit B and is incorporated in and by reference made a part of this stipulation as Exhibit B. Decedent transferred to said trust securities having a cost to him of \$290,596.

5. On or about December 26, 1923, the decedent amended said trust. A true and correct copy of said amendment is attached to the original petition in this case as Exhibit C and is incorporated in and by reference made a part of this stipulation as Exhibit C.

6. There have always been two trustees of said trust. The names of said trustees and the periods of their trusteeship have been as follows:

Jesse Koshland, Stanley H. Sinton: December 26 1922, to June 26, 1929 (Jesse Koshland continued as trustee until May 1, 1945). [30]

Jesse Koshland, Robert J. Koshland: June 26

1929, to March 6, 1944, (Jesse Koshland continued as trustee until May 1, 1945).

Jesse Koshland, Edgar Sinton: March 6, 1944, to May 1, 1945 (Edgar Sinton continued as trustee until September 28, 1945).

Edgar Sinton, Stephen A. Koshland: May 1, 1945, to September 28, 1945 (Stephen A. Koshland has continued as trustee to date).

Stephen A. Koshland, William A. Koshland: September 28, 1945, to date.

William A. Koshland and Stephen A. Koshland are the sons of Abraham Koshland and Estelle W. Koshland. Jesse Koshland is the brother of Abraham Koshland and the brother-in-law of Estelle W. Koshland. Stanley H. Sinton, Robert J. Koshland and Edgar Sinton are the nephews of Abraham Koshland and Estelle W. Koshland.

7. At the time of the creation of said trust, Exhibit B, and for many years prior thereto and for the period subsequent thereto until April 15, 1944, the date of his death, the decedent, Abraham Koshland, and Estelle W. Koshland were husband and wife.

8. The decedent, Abraham Koshland, was born on March 22, 1869, and died on April 15, 1944. He was 75 years of age at the time of his death. Estelle W. Koshland was born April 8, 1878, and is still living. She was 66 years of age at the date of decedent's death. [31]

9. The decedent and Estelle W. Koshland had

two children, Stephen A. Koshland, who was born on February 21, 1902, and was 42 years old at the date of his father's death, and William A. Koshland, who was born on November 9, 1906, and was 37½ years old at the date of the death of his father. Both children are still living. William A. Koshland never married. Stephen A. Koshland married on April 14, 1938, and his wife is still living and married to him. They have had two children, Anthony S. Koshland born on March 26, 1940, who was four years old at the time of decedent's death, and Kathryn Koshland born on July 16, 1943, who was under one year of age at the time of decedent's death. Both of said children are still living.

10. Said trust has filed its income tax return and kept its books on a calendar year basis. Its net income from all sources (and whether taxable or tax-exempt) for the calendar years 1923 to 1947, inclusive, has been as follows:

Calendar Year	Income
1923	\$22,301.76
1924	20,632.42
1925	17,843.47
1926	19,157.14
1927	20,493.97
1928	20,449.60
1929	20,203.76
1930	21,230.32
1931	19,945.51
1932	13,627.21
1933	10,211.29

Calendar Year	Income
1934	\$10,628.15
1935	10,937.23
1936	13,032.43
1937	13,579.43
1938	10,705.74
1939	11,152.10
1940	11,459.93
1941	12,534.69
1942	11,200.17
1943	10,900.58
1944	11,835.84
1945	11,332.21
1946	11,292.89
1947	11,763.30

11. All of said income has been paid year by year to Estelle W. Koshland. From the creation of said trust through December 31, 1947, she has never made any application to the trustees for the application of any part of the principal of the trust in order to provide her with an income of \$15,000 for any year.

12. The fair market value of the trust estate as of the date of death, April 15, 1944, was \$231,524.64.

13. The transfer made by Abraham Koshland in trust (Exhibit B) was not made in contemplation of death.

14. On or about September 20, 1946, \$30,000 was paid by the petitioner to the Collector of Internal Revenue in San Francisco on account of additional estate tax claimed to be due, and on or about May

9, 1947, an additional amount of \$19,062.25 was paid by petitioner to [33] said Collector on account of additional estate tax claimed to be due. On or about June 9, 1947, a claim for refund was filed with the Collector of Internal Revenue in San Francisco by the petitioner. A true and correct copy of said claim for refund is attached hereto and incorporated by reference herein as Exhibit D.

15. It is stipulated that upon recomputation under Rule 50 following the opinion of this Court in this proceeding the petitioner may receive credit up to the full 80 per cent against the basic estate tax for any additional state inheritance, estate legacy or succession taxes which are paid as a result of this proceeding.

Dated: March, 1948.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON.

Counsel for Petitioner.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Counsel for Commissioner.

[Endorsed]: T.C.U.S. Filed March 23, 1948. [34

[Title of Tax Court and Cause.]

MOTION TO AMEND RECORD

It is hereby moved by counsel for the petitioner in the above-entitled case that the record in said case be amended so as to include the facts stated in the stipulation of facts dated April 27, 1948, attached hereto and made a part hereof.

In said stipulation counsel for the petitioner and counsel for the Commissioner in the above-entitled case agree that the facts contained therein may be taken as true in said case and that the transcript of the proceedings in said case may be amended so as to include the facts stated therein.

Dated: San Francisco, California, May 3, 1948.

/s/ SAMUEL TAYLOR,

Counsel for the Petitioner.

Granted May 6, 1948.

/s/ JOHN W. KERN,

Judge.

Served May 7, 1948.

[Endorsed]: T.C.U.S. Filed May 5, 1948. [35]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby Stipulated by and between counsel for the petitioner and counsel for the Commissioner in the above-entitled case that the following facts may be taken as true in said case and that the transcript of the proceedings in this case may be

amended so as to include the facts stated in this stipulation:

The only amendment to the trust created by Abraham Koshland on December 26, 1922, Exhibit B to the stipulation of facts heretofore filed in this case, was the amendment made on or about December 26, 1923, Exhibit C to said stipulation of facts. No other amendments to said trust, Exhibit B, have ever been made.

Dated: April 27, 1948.

/s/ SAMUEL TAYLOR,
Counsel for the Petitioner.

/s/ CHARLES OLIPHANT,
Counsel for Commissioner.

[Endorsed]: T.C.U.S. Filed May 6, 1948. [36]

11 T. C. No. 109

The Tax Court of the United States

Estate of Abraham Koshland, Deceased, Jesse Koshland, Executor, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket No. 13780. Promulgated November 30, 1948.

Decedent in 1922 created a trust which he later amended in 1923. The unrestricted power was retained in the decedent, as settlor, in conjunction with his wife, the life beneficiary, to alter and amend the trust.

1. Held: the value of the remainder interest

transferred is includable in decedent's gross estate under Section 811(d)(2) of the Code, decedent's wife having no substantial adverse interest in remainders.

Held, further: that the application of Section 811(d)(2) in the present proceeding does not violate the due process clause of the fifth amendment of the Constitution.

2. In computation of the value of the includable remainder interests,

Held: petitioner has not shown error in respondent's use of the Actuaries or Combined Experience Table included in his Regulations.

Held, further: no error shown in respondent's use of the factor set forth in the Regulations applicable to quarterly payments.

Samuel Taylor, Esq., Edgar Sinton, Esq., and Bernard Shapiro, Esq., for the petitioner.

A. J. Hurley, Esq., for the respondent. [37]

Respondent determined a deficiency in the estate tax of petitioner in the sum of \$49,062.25. Practically all of this deficiency results from the inclusion by respondent in the decedent's gross estate of the value, as determined by him, of the remainder in a trust created by decedent in 1922. The reasons given by respondent for such inclusion are that the decedent reserved the power to alter, amend, or revoke as to the remainder interests in the trust, and that the transfer to the trust was intended to take effect at or after decedent's death. Petitioner alleges that respondent erred in including such interests in decedent's gross estate, and, in the alter-

native, that the respondent's valuation of such interests was too high. Petitioner also alleges that respondent erred in not allowing full credit for state inheritance taxes paid or payable, and in not allowing petitioner a deduction for legal fees as a result of this proceeding. As to the last two issues, the first is covered by the stipulation of the parties hereinafter referred to, and the second was not made the subject of any testimony.

At the hearing herein a stipulation of facts was filed by the parties. In addition oral and documentary evidence was introduced.

FINDINGS OF FACT

We find the facts to be as stipulated by the parties, and set out herein a resume of those facts stipulated, together with our findings based upon the evidence adduced at the hearing.

The decedent died on April 15, 1944, and his estate is in the process of administration in California. The estate tax return of the petitioner [38] estate was filed with the collector of internal revenue for the first district of California. At the time of his death decedent was 75 years old, and his wife, Estelle W. Koshland, who was still living at the time this case was tried, was 66 years old. She had been his wife for many years prior to 1922. They had two sons, both of whom are living. One, Stephen A. Koshland, was born in 1902, and the other, William A. Koshland, was born in 1906. The older son married in 1938. He and his wife have two children, one born in 1940 and the other in 1943.

Decedent also had a brother, Jesse Koshland, with whom he had very close personal and business contacts until his (the decedent's) death.

On December 26, 1922, the decedent created a trust by transferring certain securities, which had a cost to him of \$290,596, to Jesse Koshland and Stanley H. Sinton (a nephew) who declared themselves trustees of this property in a declaration of trust, the pertinent provisions of which read as follows:

Second: For and during the lifetime of Estelle W. Koshland of said Boston the income of this trust less proper charges and deductions including the payment of such taxes, municipal, state or Federal as may be levied thereon, shall be paid over unto her semi-annually, quarterly or oftener for and during her lifetime and upon her death then said income shall be paid over unto Abraham Koshland of said Boston, semi-annually, quarterly or oftener for and during his lifetime, and upon the death of the survivor of the said Estelle W. Koshland, and the said Abraham Koshland, said fund shall be divided into two equal parts, and one of said parts shall be held for the use and benefit of each of Stephen A. Koshland and William A. Koshland, sons of the said Estelle W. Koshland and the said Abraham Koshland, upon the following terms and conditions, to wit: the income to be paid to the guardian of a son during his minority and upon such son attaining the age of twenty-one (21) to pay the said income to him for and during his lifetime. At any time after a son shall have attained the age of twenty-one (21) to pay over to such son from time to time such pro-

portion of the principal of such trust [39] fund as the Trustees may deem best, but not more than one-third ($1/3$) of such principal shall be advanced to him before he reaches the age of thirty (30) years, the balance of the principal may be paid over to him after he attains the age of thirty (30).

Upon the death of a son, to pay over the principal of his share of this fund to the lawful issue of such son in such proportion and such manner and upon such terms as he may by any last will or testamentary instrument direct, and in default of such direction, then to and amongst his issue, or if he leave no issue, then to and amongst such other persons as he shall by any last will or other testamentary instrument direct, and in default of such direction, then to and amongst his heirs-at-law.

Third: Neither said Stephen A. Koshland nor said William A. Koshland shall have any right to anticipate payments of income, nor shall the said Stephen A. Koshland or the said William A. Koshland have any right to assign or transfer any part of the fund or income therefrom to which he may be entitled hereunder, and if any such assignment shall be made, whether voluntary or involuntary, then in the discretion of the Trustees all right of such assignor may be determined and the share of such beneficiary disposed of in the same manner as if the beneficiary had died at the date of such assignment.

The Trustees shall exercise uncontrolled discretion if in their judgment at any time it is deemed undesirable to pay over the income to any one of the sons

of said Estelle W. Koshland and Abraham Koshland to withhold the same and in that event they are authorized under the terms herein to expend the same or any part thereof for the benefit of the sons so entitled to such income, or they may allow such income or any unexpended part thereof to accumulate and add the same to the principal of said fund held for the benefit of such son.

Fourth: At any time or during any period when no income is received, or where the income received is less than Fifteen Thousand (15,000) Dollars in any year, the Trustees may, upon the application of any beneficiary, apply and expend such part of the principal of the fund as may be necessary:

(a) To provide either the said Estelle W. Koshland or the said Abraham Koshland with an income of Fifteen Thousand (15,000) Dollars for such year;

(b) To provide any one of the children of said Estelle W. Koshland and Abraham Koshland with an income of Five Thousand (5,000) Dollars for such year.

Fifth: Upon the death or resignation or inability of the said Jesse Koshland and the said Stanley H. Sinton to act as Trustees for a period of six (6) months, certified to by the beneficiaries, a new Trustee may be appointed upon the nomination of the said Abraham Koshland for and during his lifetime, and after his death [40] then by the nomination of the said Estelle W. Koshland for and during her lifetime and after the death of the said Estelle W. Koshland and the said Abraham Koshland, then upon the nomination of the two beneficiaries. A

written nomination or appointment of such new trustee shall be filed with this Agreement and Declaration of Trust and the new appointee shall in writing accept and upon such written acceptance of his appointment, and the filing thereof with the nomination, shall thereupon, without any further act or conveyance, be vested with all the rights and powers of a Trustee, and subject to all the obligations and duties herein imposed.

Sixth: The Trustees shall keep proper books of account, showing their receipts and disbursements which shall at all reasonable times be open to the inspection of the beneficiaries.

Seventh: Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland, with the approval of the Trustees hereof, at any time in his uncontrolled discretion to amend this Declaration of Trust in any manner whatever, and expressly including the right to limit or change the beneficiaries herein or the share or proportion of any beneficiary.

Eighth: Power is hereby reserved, during the lifetime of said Abraham Koshland, and given to the said Abraham Koshland at any time in his uncontrolled discretion to terminate this trust and upon such termination, the principal and undistributed income then in the hands of the Trustees shall be distributed to and amongst such person or persons as he shall direct by a written instrument addressed to the Trustees and authority is expressly reserved to the said Abraham Koshland to direct and designate himself as the person entitled to such

distribution either in part or in whole of said fund.

Ninth: Each and every one of the powers, purposes and provisions hereof, except as otherwise provided, shall be regarded as separate and distinct from every other power, purpose and provision so that no one shall be limited by reference to or inference from any other, and the enumeration of specific purposes and powers shall not be construed to limit or restrain in any manner the meaning of general terms. If a court of last resort shall decree that any of the powers, purposes, or provisions hereof are invalid, this shall not in any wise limit any other power, purpose or provision hereinbefore granted, but only such power, purpose or provision so decreed to be invalid shall be limited, and all other powers, purposes and provisions herein granted, shall be unmodified thereby.

On December 26, 1923, decedent, for the first and only time, amended [41] this trust. The amendment cancelled Articles 7 and 8 of the original declaration of trust and substituted therefor the following:

7. Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland and Estelle W. Koshland with the approval of the Trustees hereof at any time in the uncontrolled discretion of the said Abraham Koshland and Estelle W. Koshland to amend this declaration of Trust, and if during the lifetime of the said Abraham Koshland the said Estelle W. Koshland shall not be living, then any one of the sons of the said Abraham Koshland and the said Estelle W. Koshland, who is a beneficiary under the

said Declaration of Trust, may exercise in conjunction with the said Abraham Koshland the power of amendment in place of, and in substitution for, said Estelle W. Koshland, with the same force and effect as if the son so joining in such amendment had been originally and specifically named in the place and stead of said Estelle W. Koshland.

8. This trust shall be irrevocable.

Since the creation of the trust, two individuals closely related to decedent have served as trustees. Since September 28, 1945, the two trustees have been decedent's sons.

All of the income of this trust has been paid year by year to Estelle W. Koshland. Prior to 1931 this income was in excess of \$15,000 annually. Since then, it has fluctuated between \$10,000 and \$14,000. Although she has not made any application to the trustees for the payment from trust principal of any amount necessary to bring her income to the sum of \$15,000, it was the intent of the decedent and the understanding of the trustees that she have this right; and it is conceded by respondent on brief that she is and was entitled to an annual income from the trust in the amount of \$15,000.

At the time of decedent's death, as well as at the time of the hearing [42] in this proceeding (March 23, 1948) decedent's wife was in good health, and her personal physician expected her to live out her normal life expectancy.

Decedent's power of amendment of the trust was unrestricted and was exercisable by him with a per-

son not having a substantial adverse interest in the remainder.

The fair market value of the trust estate, as of the date of decedent's death, was \$231,524.64.

In determining the value of the remainder interest, which respondent contends is includable in decedent's gross estate, he subtracted from the value of the trust estate, the value of decedent's wife's life estate, calculating this value in conformity with Table A appearing in Regulations 105, section 81.10 (i). This table is based upon The Actuaries' or Combined Experience Table of Mortality.

This table is the result of experience of seventeen British life insurance companies covering a period from 1762 until 1837; it makes no distinction between the length of male lives and the length of female lives.

Many other tables of mortality have been in widespread use. The Actuaries' or Combined Experience Table of Mortality is not now used by insurance companies in computing annuities. Insurance companies do not use annuity mortality tables in determining life insurance premiums or in calculating life insurance reserves. Annuity mortality tables reflect only the experience of insurance companies with annuitants as a class. [43] They do not purport to reflect the general mortality experience. Annuitants, as a rule, are a self-selected group and tend to outlive the average. For the purpose of computing life insurance premiums, insurance companies use their own mortality tables based upon their individual experience.

Modern experience has demonstrated that females live longer than males, and some annuity tables now do take this factor into account.

The 1937 Standard Annuity Table has been used by insurance companies and by actuaries as a basis for determining annuities and life estates since 1937. The table is used for both male and female lives, except that the age of the female is taken at an age five years younger than the male life. It is one of the most current tables in use for the evaluation of annuities.

The table currently used by insurance companies for purposes of reserves and the like and considered as reflecting general mortality experience is the Insurance Commissioners' 1941 Standard Ordinary Table of Mortality. This table is based upon experience in the years 1934 to 1936, with adjustment for possible epidemics and other catastrophes.

Decedent's wife's expectation of life, under various mortality tables, is as follows:

Mortality Table	Age 66
Combined Experience or Actuaries'.....	10.46
American Experience	10.54
Insurance Commissioners' 1941 Table.....	11.01
American Annuitants'	11.95
Combined Annuity—	
Male	12.17
Female	14.52
1937 Standard Annuity—	
Male	13.81
Female	16.90
The proper factor for quarterly payments is	

1.01488, to be multiplied by the annuity value of the annual payments to Estate of Koshland under the trust.

The Value of the trust remainder, includable in decedent's gross estate, is \$116,973.71.

OPINION

Kern, Judge: The principal issue in this proceeding is whether the value of the remainder interest in the trust created and amended prior to 1924 is includable in decedent's gross estate. One of the grounds urged by respondent for inclusion is that the transfer was one in which the decedent reserved the power to alter and amend the trust within the meaning of section 811 (d) of the Internal Revenue Code¹ and the applicable regulations.² Petitioner

¹ Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States. * * *

(d) Revocable Transfers. * * *

(2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, * * *

² Regulations 105. Sec. 81.20. Transfers with power to change the enjoyment.

seeks to meet this argument by a three-fold attack. First, it is urged that after the 1923 amendments to the trust the right to amend further encompassed only slight and trivial matters; secondly, that the right to amend was in conjunction with decedent's wife, who had a substantial adverse interest in the remainder of the trust; and, thirdly, that the law and regulations may not be constitutionally applied to pre-1924 transfers.

Petitioner's first point is without merit. The trust instrument, as amended, contains a broad sweep of power. It was provided:

7. Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland and Estelle W. Koshland with the approval of the Trustees hereof at any time in the uncontrolled discretion of the said Abraham Koshland and Estelle W. Koshland to amend this declaration of Trust. * * *

therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

(1) If the transfer was made prior to the enactment of the Revenue Act of 1924 (4:01 p.m., eastern standard time, June 2, 1924), and the power was reserved at the time of the transfer and was exercisable by the [45] decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of them held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and to the extent of any adverse interest which was not substantial.

Petitioner would have us construe this language narrowly, since certain provisos appearing in the paragraph prior to amendment were deleted. Rather than an aid to petitioner's view, these omissions can be interpreted as clothing decedent with as broad a power as it was possible to accord him. In any event, the mere fact that no limitations appear cannot be said to diminish the general power granted.

None of the cases cited to us by petitioner, of which *Theopold, Exr., v. United States*, (CCA-1), 164 Fed. (2d) 404, is an example, are in point, as none contained as general a power of amendment as retained by this decedent. In the *Theopold* case, the power was limited to amend the trust instrument only "so that it will more clearly express my actual intentions * * *." The Circuit Court recognized that the trust instrument was inexpertly drawn and the trustor wished to retain the power to settle meaning. It is further observed:

* * * Certainly if he had wished to retain broad powers of amendment as to substance he could have said so very simply by merely reserving a general power to alter, amend or revoke. * * * Such a general power as referred to by the court was here retained.

Petitioner next contends that, irrespective of the scope of the power of amendment, it could not be exercised except in conjunction with a person having a substantial adverse interest. This raises the question of whether the life tenant, decedent's wife,

can be said to have a substantial adverse interest in the remainder.³ We believe that she did not.

Petitioner's argument, with which we can not agree, is that decedent's wife had a substantial adverse interest in the remainder, since she possessed the right during her lifetime to have corpus invaded if it became necessary to assure her the receipt of \$15,000 annually, and it was to her benefit to retain her sons as remaindermen. This approach loses sight of the meaning and significance of the "substantial adverse interest" concept. See *Flood v. United States*, (CCA-1), 133 Fed. (2d) 173; *Union Trust Company of Pittsburgh, Admr., v. Driscoll*

³ The question of whether the decedent's wife had a substantial adverse interest in this pre-1924 inter vivos transfer becomes important under the established doctrine of *Reinecke v. Northern Trust Co.* 278 U. S. 339. It was there recognized that a transfer in trust, where the settlor reserved to himself alone or to himself with a person having a non-adverse interest, was not a completed transfer because the property did not pass completely out of his control until his death, and as such was includable in the decedent's gross estate even prior to the enactment of the Revenue Act of 1924. The taxing statute is not unconstitutional as to trusts created prior to its enactment if the transfers thereunder are incomplete. *Chase National Bank v. United States*, 27 U. S. 327. Section 302(d) of the Revenue Act of 1924 first introduced the provision that if the settlor in conjunction with any person reserved the right to revoke or otherwise materially change the transferred interests, the conveyance was taxable. As to transfers after that date, the "substantial adverse interest" requirement is immaterial. *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85. [47]

(CCA-3), 138 Fed. (2d) 152, certiorari denied, 321 U. S. 764.

Petitioner relies principally upon *Commissioner v. Kaplan*, (CCA-1), 102 Fed. (2d) 329, and seeks to distinguish *David J. Lit, et al., Executors*, 28 B.T.A. 853, affirmed, 72 Fed. (2d) 551, and *Estate of Charles M. Thorp*, 7 T. C. 921, affirmed, 164 Fed. (2d) 966, certiorari denied, 333 U. S. 843. In the *Kaplan* case, decedent created a trust in 1923, of which he was trustee and his wife life beneficiary, with remainders over after his and his wife's deaths to their children. The trust could be amended and revoked "by the Trustees," assented to by the life beneficiary. Under these facts, it was held that decedent's wife had a substantial adverse interest in the remainder, and hence it was not includable in decedent's gross estate. Among the reasons assigned to support this conclusion was the following:

In this connection it is to be noted that Mr. Kaplan [decedent] as an individual reserved no right of revocation but rather granted these rights to the trustee then in office. This fact, if not controlling, supports the conclusion that the trust was, when made, a fully completed transfer of all interests in the trust estate. * * * [48]

The Circuit Court distinguished the *Lit* case:

Lit et al. v. Commissioner of Internal Revenue, 3 Cir., 72 F. 2d 551, relied upon by the petitioner, was a case where the remainder interest was held properly included, the trust instrument reserving in the settlor the right of revocation with the assent of the life beneficiary. Apart from the distinguishing fact

that the donor expressly reserved the right of revocation, it appears, also, that the trust was created in 1927 and the Revenue Act of 1926, sec. 302(d), 44 Stat. 71, was applied. * * *

In the Lit case, the decedent in 1927 created a trust, the income of which was to be paid to his wife for life, and after the death of both, remainders were given to others. The power of amendment and revocation was retained by decedent in his individual capacity, in which his wife was required to join. It was there held that the value of the life estate vested in the wife should not be included as part of decedent's gross estate, but the remainder interest was includable; the wife was said to have a non-adverse interest in the remainder, and trust was deemed revocable within the meaning of Section 302(d) of the Revenue Act of 1926. It was there said by us:

* * * All that the settlor had to do in order to exercise this reserved power of revocation as to David Jack Lit was to do it in conjunction with Rosa L. Lit [his wife], who was in no sense an adverse interest as to the remainder interest of the trust estate. * * *

While it is true that in the Porter case the settlor of the trust was left free to exercise the limited power which he reserved, alone and without having to secure the consent of any one, whereas in the instant case the settlor must secure the written consent of his wife, Rosa L. Lit, still, as we have already stated, Rosa L. Lit had no interest in the remainder interest and as to that she was not an ad

verse interest and we think these facts bring the situation as to the remainder interest within the purview of the language of section 302 (d). * * *

The Lit case was cited approvingly by us in the Thorp case, and by the Circuit Court in its affirmance. There, decedent created a trust in 1918, reserving the power in himself to terminate the trust cutting off the [49] remainder interest upon the request of the life beneficiaries. We held that the value of the transferred remainder interest was includable in decedent's gross estate under Section 811(d)(2) of the Internal Revenue Code. The Circuit Court, in its affirmance, stated:

* * * On the question whether the interests of the five children were "substantially adverse," the Tax Court said, "Here the persons in whom the right to terminate was reserved were obviously not adversely interested in the exercise of that right as to the remainder—which is the only matter basing the present controversy." Bearing in mind that by exercising their power of termination the children would have received "absolute property" in the corpus, rather than merely the income therefrom, and also the fact that there was a close family relationship, we are not prepared to say that the Tax Court erred in choosing from conflicting inferences the conclusion that their interests were not "substantially adverse." * * *

Taxpayer's further contention that a beneficiary of a trust is "adverse to the grantor * * * regardless of whether a change would benefit or injure him" not only rejects the ordinary meaning of the

word "adverse," but also meets such insurmountable obstacles as *Helvering v. City Bank Co.*, *supra* at page 90, and the express language of the Tax Court in *Lit. v. Commissioner*, 28 B.T.A. 853, 860-861 (1933), affirmed by this court in 72 F.2d 551 [14 AFTR 481] (1934). * * *

Such cases as *Estate of Frederick S. Fish*, 45 B.T.A. 120, where the life tenant had also a power of appointment over the remainder interest, and *Mackay, et al., Executors, v. Commissioner*, (CCA-2) 94 Fed. (2d) 558, reversing 33 B.T.A. 765, holding that a remainderman has an adverse interest in the life estates, cited to us by petitioner, are clearly distinguishable and are not in point.

Since we hold that decedent reserved to himself the power of amendment with a person whose interest was non-adverse as to that portion of the trust property sought to be included in decedent's gross estate, petitioner's constitutional argument, based upon the application of the law and [50] regulations to pre-1924 transfers disappears. *Estate of Charles M. Thorp*, *supra*. Cf. *Commissioner v. Kaplan*, *supra*; *Union Trust Company of Pittsburgh Adm., v. Driscoll*, *supra*.

In view of our decision that the remainder interest is includable in decedent's gross estate, under Section 811(d), it becomes unnecessary to decide whether it is also includable under 811(c) of the Code. There does remain, however, one further question, i.e., the value of the interest to be included.

The parties have stipulated the fair market value of the trust estate as of the date of death. The ar-

of disagreement is as to the value of the life interest which is to be subtracted. Petitioner contends that it is unsound to determine such value in conformity with respondent's regulations,⁴ as they are based upon an absolute mortality table, and further that an improper factor for quarterly payment is therein employed. The burden of proving these contentions is upon petitioner. *Estate of Charles H. Hart*, 1 T.C. 989; *Estate of Koert Bartman*, 10 T.C. 1073.

The questions petitioner raises are not new. *Estelle May Affelder*, 7 T.C. 1190; *Henry F. Du Pont*, 2 T.C. 246. We have carefully considered all of the evidence introduced by petitioner. It is of the same purport as that presented by taxpayers in some of the earlier cases, and we must conclude that petitioner has not borne the burden of proof on either point.

An actuarial expert called by petitioner testified as to the history of various mortality tables, and then expressed the opinion that if he had his choice of the table to be used to value the life estate he would select [51] the 1937 Standard Annuity Table. This table shows a life expectancy for decedent's wife of over six years more than the table embodied in respondent's regulations, and about five years more than the table approved in *Anna L. Raymond*, 40 B.T.A. 244, affirmed, 114 Fed. (2d) 140, certiorari denied, 311 U. S. 710, a case upon which petitioner chiefly relies. It should be observed that the latest mortality table presented indicates a

⁴ Regulations 105, Section 81.10(i).

life expectancy of 11.01 years for decedent's wife as compared to 10.46 years in the table incorporated in respondent's regulations.

The table petitioner urges might be worthy of further consideration if our question were the cost of an annuity from a commercial insurance company. This was the underlying problem posed in the Raymond case, and it was there considered proper to utilize a table that such companies were using in their annuity business. We observed in the Bartman case, *supra*:

* * * that insurance companies take into consideration the element of self selection in writing annuities; and that they use whatever tables are best suited for their particular needs. * * *

There is no showing here that the mortality of inheritors or donees closely resembles that of purchasers of annuity policies. In fact, contrary evidence appears in the record.

Whatever may be the shortcomings of the table used by respondent, cf. concurring opinion of Mellett, Jr., in *Henry F. Du Pont, supra*, petitioner has not convinced us that the 1937 table or any other table, not embodied in respondent's regulations must be applied in this proceeding, or that respondent's use of the Combined Experience Table in this proceeding is erroneous. *Estelle May Affelder, Estate of Koert Bartman*, both *supra*. [52]

Even greater weakness pervades petitioner's argument as to the proper factor for quarterly payments. The actuarial expert testified that the factor respondent used was proper if only an annuity for

a term certain were involved, but was not correct if the annuity were for life. He testified further that the value of a life annuity, payable quarterly, is less than the value of an annuity certain, payable quarterly, for a term equal to the annuitant's life expectancy. Yet the factor petitioner urges and the method of its application lead to a higher value for a life annuity. This discrepancy could not be adequately explained by petitioner, nor was there any significant evidence as to the derivation of the factor it sought to have us apply. Petitioner's view cannot be sustained. *Estelle May Affelder, supra.*

Decision will be entered under Rule 50. [53]

The Tax Court of the United States
Washington

Docket No. 13780

Estate of ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion promulgated November 30, 1948, counsel for respondent filed a recomputation of petitioner's liability on January 19, 1949. On February 14, 1949,

counsel for petitioner filed an acquiescence to respondent's recomputation. Now, therefore, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of \$33,119.49.

(Seal) /s/ C. P. LeMIRE,
Judge.

Entered Feb. 25, 1949. [54]

The United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 13780

Estate of ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW BY THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable the Judges of the United States
Court of Appeals for the Ninth Circuit:

The Estate of Abraham Koshland, Deceased, Jesse Koshland, Executor, respectfully petitions this Honorable Court to review the decision of The Tax Court of the United States entered in the above-entitled cause on the 25th day of February, 1949, and determining a deficiency in estate tax of \$33,119.49. [55]

I.

Jurisdiction

Petitioner is the estate of a decedent who died on April 15, 1944, and whose estate is being probated in the Superior Court of the State of California, in and for the City and County of San Francisco. Jesse Koshland is the duly appointed, qualified and acting executor of said estate.

The estate tax return for petitioner was filed with the Collector of Internal Revenue, First District of California, in the City and County of San Francisco, State of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction of this Court to review the aforesaid decision of The Tax Court of the United States is founded on Internal Revenue Code Sections 1141 and 1142.

II.

Prior Proceedings

The petitioner, on the 5th day of May, 1947, filed with The Tax Court of the United States a petition requesting a redetermination of a deficiency in estate tax in the amount of \$49,062.25 set forth by the Commissioner of Internal Revenue in a notice of deficiency dated April 7, 1947. The petitioner, on the 23rd day of March, 1948, filed with The Tax Court of the [56] United States an amended petition requesting a redetermination of the aforesaid deficiency. The case was heard before the Honorable

John Worth Kern at San Francisco, California, on March 23, 1948. The Tax Court promulgated its findings of fact and opinion on November 30, 1948 (11 Tax Court No. 109) and entered its decision on February 25, 1949.

III.

Nature of Controversy

The controversy herein involves petitioner's correct estate tax liability. This in turn depends on the following two issues which were presented to The Tax Court:

(1) Whether the remainder interest in a trust created by petitioner's decedent on or about December 26, 1922, and amended by said decedent on or about December 26, 1923, should be included in the gross estate.

(2) In the event that said remainder interest should be included in the gross estate, what was the value of the life estate in Estelle W. Koshland, petitioner's decedent's wife.

Petitioner and the Commissioner of Internal Revenue agreed that the value of said life estate should be subtracted from the value of said trust estate in determining the value of said remainder interest. The disagreement was as to the manner of valuation of said life estate. [57]

Before this Court of Appeals, petitioner does not press the point that the remainder interest in said trust should be excluded. The sole issue to be pre-

sented to this Court is the valuation of the life estate of Estelle W. Koshland. Petitioner contends that The Tax Court erred in its determination of the value of said life estate.

Dated: March 18, 1949, San Francisco, California.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed March 21, 1949. [58]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To the Chief Counsel of the Bureau of Internal
Revenue, Washington, D. C.:

Please Take Notice that petitioner, on the 21st day of March, 1949, filed with the Clerk of The Tax Court of the United States, his petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above-entitled cause.

A copy of the petition for review as filed is herewith attached and served upon you.

San Francisco, California, March 21, 1949.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Attorneys for Petitioner. [59]

Receipt of a Copy of the foregoing Notice and the attached Petition is hereby acknowledged this 22nd day of March, 1949.

/s/ CHARLES OLIPHANT,

Chief Counsel,

Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 1, 1949. [60]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States,
Washington, D. C.:

The petitioner on review in the above-entitled cause hereby designates for inclusion in the record on review, and you are hereby requested to prepare, transmit and deliver to the Clerk of The United States Court of Appeals for the Ninth Circuit (in either the originals or copies duly certified as correct) the following:

1. The entire record, proceedings and evidence in the above-entitled cause before the Tax Court.
2. Petition for review. [61]
3. Notice of filing petition for review.
4. This designation of contents of the record on review.

Dated March 21, 1949, San Francisco, California.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Attorneys for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed March 23, 1949. [62]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

To the Chief Counsel of the Bureau of Internal
Revenue, Washington, D. C.:

Please Take Notice that petitioner on the 23rd
day of March, 1949, filed with the Clerk of The Tax
Court of the United States his Designation of Con-
tents of Record on Review in the above-entitled
cause. A copy of said designation is hereunto at-
tached and served upon you.

San Francisco, California, March 23, 1949.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Attorneys for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed April 14, 1949. [63]

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON UPON REVIEW

Petitioner states that it intends to rely on the
following points upon the review of the decision of
The Tax Court of the United States in the above-
entitled cause:

1. The Tax Court erred in view of the uncontra-
dicted evidence in failing to value the life estate of

Estelle W. Koshland on the basis of the 1937 Standard Annuity Table.

2. The Tax Court erred in valuing the life estate of Estelle W. Koshland on the basis of the Actuaries' or Combined Experience Table. In view of the uncontradicted evidence, it erred in not finding the Commissioner's use of said table to be arbitrary and invalid.

3. The Tax Court erred in view of the uncontradicted evidence in failing to find that the factor for quarterly [64] payments to be used in the valuation of said life estate was .375 to be added to the factor for annual payments.

4. The Tax Court erred in finding the factor for quarterly payments to be used in the valuation of said life estate to be 1.01488 to be multiplied by the factor for the annual payments. In view of the uncontradicted evidence, it erred in not finding the Commissioner's use of said factor to be arbitrary and invalid.

San Francisco, California, March 23, 1949.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed March 25, 1949. [65]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING STATEMENT OF
POINTS TO BE RELIED ON UPON
REVIEW

To the Chief Counsel of the Bureau of Internal
Revenue, Washington, D. C.:

Please Take Notice that petitioner on the 25th
day of March, 1949, filed with the Clerk of The Tax
Court of the United States his Statement of Points
to be Relied on Upon Review in the above-entitled
cause. A copy of said statement is hereunto attached
and served upon you.

San Francisco, California, March 25, 1949.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed April 14, 1949. [66]

The Tax Court of the United States
Washington

Docket No. 13780

Estate of ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 34, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation as to Contents of Record on Review" in the proceeding before The Tax Court of the United States entitled: "Estate of Abraham Koshland, Deceased, Jesse Koshland, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 13780 and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United

States, at Washington, in the District of Columbia,
this 15th day of April, 1949.

(Seal) /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States. [67]

Before The Tax Court of the United States

Docket No. 13780

In the Matter of: ESTATE OF ABRAHAM
KOSHLAND, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room, U. S. Appraisers Building
630 Sansome St., San Francisco, Calif.

March 23, 1948—10:00 a.m.

(Met pursuant to notice.)

Before: Honorable J. W. Kern, Judge.

Appearances: Samuel Taylor, Edgar Sinton, Bernard Shapiro, 1211 Balfour Building, San Francisco, California, appearing on behalf of Estate of Abraham Koshland, Deceased, Petitioner. A. J. Hurley, (Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [1*]

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

PROCEEDINGS

The Court: Call the case of Estate of Abraham Koshland, Deceased.

The Clerk: Docket 13780.

Mr. Taylor: Ready for the Petitioners, Your Honor. Samuel Taylor, Edgar Sinton, and Bernard Shapiro, for the Petitioner.

Mr. Hurley: A. J. Hurley for the Respondent. Ready, Your Honor. [2]

* * * *

LAMBERT B. COBLENTZ,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified [18] as follows:

Direct Examination

The Clerk: Please be seated and state your name and address.

The Witness: I am Dr. Coblentz, office 384 Post, San Francisco.

The Clerk: Will you spell your last name, please.

The Witness: C-o-b-l-e-n-t-z.

By Mr. Taylor:

Q. Your full name is Lambert Coblentz?

A. Lambert B.

Q. How long have you been in practice, Doctor?

A. Over 40 years.

Q. Are you a specialist?

A. I am rated as a specialist in internal medicine.

(Testimony of Lambert B. Coblentz.)

Q. And you are qualified as an internist by the American Board of Internal Medicine?

A. I am.

Q. Have you ever taught medicine?

A. I have.

Q. Where?

A. At the Stanford University, at the San Francisco Hospital.

Q. Has Estelle W. Koshland, the wife of Abraham Koshland, the decedent in this case, ever been a patient of [19] yours? A. She has.

Q. When did she become a patient?

A. In 1943, I think. I think 1943 was the date. I don't remember the exact month.

Q. Wasn't she a patient before that?

A. I think it was—it might have been a little earlier.

Q. I have your file in this case. Could you——

A. I could refresh my memory.

Q. ——look in it and refresh your recollection on that? A. 1940.

Q. Yes. A. August, 1940.

Q. And was she a patient of yours as of the date of death of Abraham Koshland, April 15, 1944? A. She was.

Q. Did you see her professionally shortly prior to and at the time of her husband's death?

A. I did.

Q. Immediately after that time?

A. Yes, I did.

Q. Now, will you state whether in your opinion

(Testimony of Lambert B. Coblentz.)

she was in good health as of the date of the death of her husband? [20]

A. She was in good health.

Q. Did she have any condition which to your knowledge would indicate that her life expectancy would be less than normal?

A. None that I could discover.

Q. So that as far as you knew, you had every reason to believe she would live out her normal life expectancy? A. Normal expectancy.

Q. And that conclusion was based on periodic physical examinations of her from a period in 1940 until after the death of her husband?

A. Right.

Q. So far as you know she is still in good health?

A. As far as I know. [21]

* * * *

Mr. Taylor: It is hereby stipulated between counsel, subject to the objection by the Respondent on the ground that said facts are immaterial, that the cost as of April 15, 1944, of a non-refund single premium life annuity for a female age 66 purchased from a standard legal reserve life insurance company regularly engaged in the selling of annuity contracts would have been at least \$219,000 for an annuity paying said person \$15,000 a year, \$171,000 for an annuity paying said person \$11,733.82 a year, and \$135,000 for an annuity paying said person \$9,260.99 a year.

It is further stipulated that by a non-refund annuity is meant an annuity which pays the annuitant

a stipulated sum for his life, but the payments under which terminate upon the death of the annuitant.

May it be so stipulated, counsel?

Mr. Hurley: Yes, if the Court please. I am prepared, however, to object as counsel stated, and I think the objection [45] is evident.

* * * *

The Court: The Respondent's objection is taken under advisement.

Mr. Taylor: Mr. Waites, will you take the stand, please.

Whereupon,

GEORGE FRANK WAITES,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [46]

Direct Examination

The Clerk: Please be seated.

State your name and address.

The Witness: My name is George Frank Waites, business address, 620 Market Street, San Francisco, California.

The Clerk: Please spell your last name.

The Witness: W-a-i-t-e-s.

By Mr. Taylor:

Q. How old are you, Mr. Waites?

(Testimony of George Frank Waites.)

A. I was born in 1906 and I am now 42 years of age.

Q. What is your profession?

A. My profession is a consulting actuary.

Q. Will you state your background and your experience?

A. I am a graduate with honors in mathematics from the University of British Columbia. From 1933 to 1941 I was engaged with the Insurance Department of the Dominion of Canada in actuarial work. In 1941 I became associated with the Occidental Life Insurance Company of California as an officer with the title of Assistant Actuary. On December 31, 1945, I resigned and became a consulting actuary, and I have been in such business since that time.

Q. Are you a member of any actuarial societies?

A. I am a Fellow by examination of the Actuarial Society of America, and of the American Institute of Actuaries. [47]

Q. When did you become a Fellow of these societies?

A. I became a Fellow of those societies in 1940.

Q. In 1940 for each society?

A. Yes. I became a Fellow of each society in 1940.

Q. How many Fellows are there?

A. I would say that there are a total of between five hundred and six hundred Fellows who are Fellows of those societies. That includes Fellows who

(Testimony of George Frank Waites.)

are both in Canada and in Australia as well as in the United States.

Q. Are you including all the persons who are members of each society in that five hundred or six hundred group?

A. Oh, no. That includes those who have attained their fellowship degrees. In addition to the Fellow there are a number of associates.

Q. No, I mean all the Fellows of each society.

A. Yes, that five hundred to six hundred included the Fellows of both groups. A total.

Q. A person who is an associate of such a society is of a lower order, so to speak, than a person who is a Fellow. Is that correct?

A. I would say so.

Q. When did you enter practice as a consulting actuary? A. On January 1, 1946.

Q. Are you associated with any actuarial firm?

A. At present I am associated with the firm of consulting [48] actuaries, Coates & Herfurth of San Francisco.

Q. And Los Angeles?

A. We also have offices in Los Angeles.

Q. Now, will you tell the Court what an actuary is?

A. An actuary may be defined as a mathematician who has specialized in life contingencies, probabilities and expectancies, based upon mortality tables and their application in conjunction with compound interest tables.

* * *

(Testimony of George Frank Waites.)

Q. What does your work as a consulting actuary consist of?

A. My work as a consulting actuary consists of advising insurance companies and other interested people of mortality [49] tables to be used in connection with the determination of premiums, reserves, annuities, and also it deals with work involving annuities in connection with pension plans, and also deals with the application of mortality tables, expectancies and so on, to life estates.

Q. To the computation of the values of life estates?

A. That is the computation of the values of life estates.

Q. Are you acquainted with all types of mortality tables?

A. Yes. An actuary must be intimately familiar with all the standard mortality tables, and he must know something about their origin, their background, their validity, their application, and any other facts that may pertain to them.

Q. Will you tell the Court what a mortality table is?

A. A mortality table is a schedule showing out of a certain number under observation the number who survive and the number who die at each age. A mortality table is the basis on which all life insurance contracts are based, all annuity contracts are based on them, and life estates are also based on them.

Q. Is it a device by which the probability of liv-

(Testimony of George Frank Waites.)

ing and dying can be ascertained on the assumption that what has happened in the past will happen in the future?

A. The life table is the number living and the number dying at each age. From these you can determine the probability [50] of living or dying at each age, and the expectancies of life at each age.

Q. Now, are you familiar with the Actuaries' or Combined Experience Mortality Table? This is the table which is referred to in Regulations 105 Section 81.10 (i). A. I am.

Q. Are you familiar with Table A, the table entitled "Table, 4 Per Cent," showing the present worth of an annuity or a life estate and of the reversionary interest, which is a part of Regulation 105 Section 81.10 (i)? A. Yes.

Q. Is this table based upon the Actuaries' or Combined Experience Table of Mortality?

A. It is based on the Actuaries' or Combined Experience Mortality Table.

Q. Does Table A show the annuity value of \$1.00 a year first payment at the end of the first year for the lifetime of a person of a designated age in accordance with the Actuaries' or Combined Experience Table of Mortality?

A. Part of that table does.

Q. Yes. You mean it shows other things too?

A. Well, as I recollect it, it also shows the value of reversions there in addition to the life annuity. But as I recollect it, there is a column showing the

(Testimony of George Frank Waites.)

life annuity, another column showing the reversion.

Q. But it does show the annuity value?

A. Yes.

Q. So that if the Actuaries' or Combined Experience Table of Mortality is obsolete, would Table A also be obsolete? A. Yes.

Q. Will you define what you mean by "life expectancy"?

A. Life expectancy, or expectation of life may be defined as the probable average future lifetime of a person of designated age.

Q. As indicated in a mortality table?

A. As indicated in a mortality table.

Q. Does life expectancy mean the same as expectation of life, or complete expectation of life?

A. They are used synonymously.

Q. In your opinion is the Actuaries' or Combined Experience Table of Mortality obsolete?

A. Yes, unquestionably so.

Q. In your opinion was that true as of April 15, 1944? A. Yes.

Q. Would you as an actuary use that table in the valuation of a life estate? A. No.

Q. And is your answer the same were a life estate to be valued as of April 15, 1944?

A. Yes. I wouldn't use it as of that date [52] either.

Q. Now, will you state the reasons for the opinions you have just expressed?

A. Well, I think the best illustration of the fact that this table is obsolete is by reference to life

(Testimony of George Frank Waites.)

expectancies that are shown by various tables, and for that purpose I have assembled life expectancies under various tables to refer to. Probably at this time——

Q. Before you testify as to those life expectancies it might help the Court if you give a bit of history and the background of the tables which you expect to refer to.

A. Well, the Combined Experience Table of Mortality was first published in 1843, incidentally. It was based upon the experience of 17 British Life Insurance Companies and covered a period from 1762 until 1837. It did not distinguish between male or female lives. Its general use was discontinued well prior to 1900.

Q. That is when other mortality tables based on more recent experience came into use?

A. Yes.

Mr. Taylor: I ask that this document which is entitled "Combined or Actuaries' Experience Table" be marked for identification.

The Clerk: Marked for identification Petitioner's Exhibit No. 3. [53]

(The table referred to was marked as Petitioner's Exhibit No. 3, for identification.)

By Mr. Taylor:

Q. I show you Petitioner's Exhibit No. 3 entitled on top of the page, "Combined or Actuaries' Experience Tables," and consisting of three pages or photostats of three pages, designated Pages 18,

(Testimony of George Frank Waites.)

183 and 184, and also entitled, "Table 22, Combined Experience Table of Mortality," and ask you to state what that is?

A. This is the combined or actuaries' experience mortality table.

Q. May I have the book from which this table was photostated? A. Yes, sir.

Mr. Taylor: I show you, Counsel for Respondent, Wolfe's "Inheritance Tax Calculations," a book published in New York, 1905, by Baker Voorhis & Company, and show to you Pages 182, 183 and 184 of that book from which the photostats, Petitioner's Exhibit 3 for identification, were taken. Is that agreeable, counsel?

Mr. Hurley: Yes, I will stipulate if that is what counsel desires me to, that this is a correct, true and correct photostatic copy of the table shown on those pages.

Mr. Taylor: I offer Petitioner's Exhibit 3 for identification into evidence. [54]

Mr. Hurley: No objection.

The Court: Accepted in evidence.

The Clerk: Exhibit No. 3.

(The table referred to, heretofore marked as Petitioner's Exhibit No. 3 for identification, was received in evidence as Petitioner's Exhibit No. 3.)

[Printer's Note]: Petitioner's Exhibit No. 3 is set out in full at page 148 of this printed Record.

(Testimony of George Frank Waites.)

By Mr. Taylor:

Q. Will you proceed, Mr. Waites, with your description of the mortality tables, to which you were referring?

A. The next mortality table that I will refer— incidentally, I am just selecting certain standard mortality tables here for purposes of illustration. The next table that I will refer to is the American Experience Table of Mortality.

The American Experience Table of Mortality first appeared as such in the New York Insurance Code in 1868. It was based on the experience of the Mutual Life Insurance Company of New York. It did not distinguish between male nor female lives.

Q. Was that true also of the Actuaries' or Combined Experience Table?

A. Yes. That table did not distinguish between male and female lives.

Q. Yes. Will you proceed, please.

A. For many years the American Experience Mortality [55] Table was used as a basis for valuation by the states until the introduction of other tables which reflect more closely the modern experience, that is, the modern probability of dying. In other words, there are more modern tables that are now in general use.

Q. Is this table now considered obsolete?

A. The American Experience Table is now considered obsolete as well.

Q. Was that true as of April 15, 1944?

A. That would be true as of 1944.

(Testimony of George Frank Waites.)

Mr. Taylor: I will offer in evidence Appendix B—strike that.

I offer in evidence a two-page photostat entitled “Appendix B, Mortality Tables, American Experience Table.”

Mr. Hurley: No objection.

The Court: Accepted in evidence.

The Clerk: Petitioner’s Exhibit No. 4.

(The document referred to was marked and received in evidence as Petitioner’s Exhibit No. 4.)

[Printer’s Note]: Petitioner’s Exhibit No. 4 is set out in full at page 150 of this printed Record.

Mr. Taylor: There is no objection to the use of the photostat?

Mr. Hurley: No objection.

By Mr. Taylor:

Q. I show you Petitioner’s Exhibit No. 4. This is the table to which you referred in talking of the American Experience [56] Table of Mortality, is it not? A. Yes.

Q. Will you proceed with your description?

A. The next table that I have used for illustration is the American Annuitants Mortality Table. The American Annuitants Mortality Table was based upon an investigation by life insurance companies of annuities issued prior to 1917. This experience brought to light that females were living for a much longer time than males.

(Testimony of George Frank Waites.)

The American Annuitants Mortality Table was derived from the investigation that I have indicated, and it was used for some time for the purpose of computing annuity premiums, reserves and expectancies thereon.

However, general use of this table has also been discontinued due to the introduction of more modern tables.

Q. It this a composite table—by that I mean a table covering both male and female experience?

A. This table—there have been tables developed from this experience for both male and female lives, but the male table is used more extensively than the female.

Q. When you refer to the American Annuitants Table of Mortality is that the same table as the American Annuitants Table, Ultimate Male?

A. That is one of the tables that was derived from the experience that I referred to. [57]

Mr. Hurley: I didn't quite understand whether the witness' testimony is that this table as you have here, Mr. Taylor, is the same table to which he has just testified?

Mr. Taylor: I will show it to him and clear that point up.

Will you mark the table called "American Annuitants Table, Ultimate Male" for identification?

The Clerk: Mark it for identification Exhibit 5.

(The table referred to was marked as Petitioner's Exhibit No. 5, for identification.)

(Testimony of George Frank Waites.)

By Mr. Taylor:

Q. I show you Petitioner's Exhibit for identification No. 5, a table of two pages entitled "American Annuitants Table, Ultimate Male," and ask you if this is the table to which you referred to as American Annuitants Table of Mortality, as to which you have just testified?

A. This is the male table of the American Annuitants Mortality Table. There are other tables. There is a female table and some others.

Q. This is then the table on which you have testified?

A. That's right, yes, and the table that I have used for my illustrations of expectancies.

Mr. Taylor: I offer in evidence Petitioner's No. 5 Exhibit for identification.

Mr. Hurley: No objection. [58]

The Court: Received in evidence.

The Clerk: Exhibit No. 5.

(The table referred to, heretofore marked as Petitioner's Exhibit No. 5, for identification, was received in evidence as Petitioner's Exhibit No. 5.)

[Printer's Note]: Petitioner's Exhibit No. 5 is set out in full at page 153 of this printed Record.

Mr. Taylor: No objection to the use of the photostat?

Mr. Hurley: No objection.

(Testimony of George Frank Waites.)

By Mr. Taylor:

Q. Will you continue with your description, Mr. Waites, please?

A. The next table that I have used for illustration is the Combined Annuity Mortality Table. When group pensions and other benefits came into general use the insurance companies felt that they were in need of a table that would serve this purpose. For this reason the Combined Annuity Mortality Table was developed.

In developing it they used group life insurance experience for the younger ages, and the American Annuitants Mortality Table for the higher ages.

It was brought out again that females were living longer than males. However, it was found that the one table could be used for both male and female lives. In fact, the male table could be used provided the females were taken at an age four years younger than the male lives. Accordingly, the [59] one table is used for the two.

It was adopted with 4 per cent interest by the State of New York as a standard for the valuing of annuities and reserves thereon, for all annuities issued on and after January 1, 1930. However, its use has been discontinued in general by actuaries and insurance companies because of the introduction of more modern mortality tables.

Q. Has the use of that table been discontinued because of increase in longevity?

A. Yes. By the use of more modern tables, mean that people are living longer.

(Testimony of George Frank Waites.)

May I go back to some testimony I gave a few minutes ago? When I indicated that a mortality table is based on experience in the past and is used to forecast experience in the future—now, whenever one mortality table is developed they hope that it is going to anticipate the experience of the future, but it never does that. It seems to me that each time a table is developed they find that people are living longer than they anticipated under that table.

Q. Now, when you testified that one table would do for both male and female lives provided that the female lives were taken at an age four years younger than the male lives, did you mean, for example, that a female aged 66 would be treated as having the same expectancy of life as a male aged 62? Is that what you mean? [60]

A. Yes.

The Court: Why is it that these changes are not reflected, at least I don't think they are, in insurance premiums? Is that because of the fact that as the expectancy increases the rate of interest decreases?

The Witness: That has been the experience in the past. But the main reason is that through the use of dividends they return to you any mortality savings that they earn.

The Court: All right, Mr. Taylor.

By Mr. Taylor:

Q. They are reflected, are they not?

A. Oh, yes. The insurance companies have adopted a new table for the determination of their

(Testimony of George Frank Waites.)

premiums as of January 1 of this year.

Mr. Taylor: I will bring that out.

The Court: All right.

Mr. Taylor: Mr. Clerk, I hand you a document entitled "Combined Annuity Table" consisting of three pages, and ask that you mark it for identification.

The Clerk: Marked for identification Exhibit 6.

(The table referred to was marked as Petitioner's Exhibit No. 6, for identification.)

By Mr. Taylor:

Q. I show you Petitioner's Exhibit 6 for identification, document entitled "Combined Annuity Table," and ask if this is [61] the table which you described as "Combined Annuity Mortality Table," and as to which you just testified? A. Yes.

Q. I note on this table, and I believe it is true of the other tables to which you testified, except the Actuaries' or Combined Experience Table, that there is a column headed "Number Living," another column headed "Number Dying," a column headed "Yearly Probability of Dying," and a column headed "Complete Expectation of Life."

Would you explain those columns for the record, please?

A. The number living shows the observed number of lives on which the mortality table is based. For instance, this table shows at age 10, which is the lowest age in this table, shows a number living of 100,000. It also shows a number dying of 153. That would be the number dying before they at-

(Testimony of George Frank Waites.)

tained age 15.

The yearly probability of dying is obtained from those two columns and is merely the ratio of the number dying to the number living at the beginning of the year.

Is that sufficient for your purpose?

Q. Yes, I believe so.

You testified that complete expectation of life is the same as life expectancy?

A. That's right. [62]

Mr. Taylor: I offer in evidence Petitioner's Exhibit 6 for identification.

Mr. Hurley: No objection.

The Court: Accepted in evidence.

Mr. Taylor: No objection to the use of the photostat?

Mr. Hurley: No.

The Clerk: Exhibit No. 6.

(The table referred to, heretofore marked as Petitioner's Exhibit No. 6, for identification, was received in evidence as Petitioner's Exhibit No. 6.)

[Printer's Note]: Petitioner's Exhibit No. 6 is set out in full at page 155 of this printed Record.

By Mr. Taylor:

Q. So that the record may be clear, I show you Petitioner's Exhibit 3 in evidence, the Combined or Actuaries' Experience Table of Mortality, and ask you to explain the symbols "LX," "D" and "Ex-

(Testimony of George Frank Waites.)

pectation," which are found on top of the columns in that table.

A. The "LX" symbol is merely a shorthand form of indicating the number living at any age under observation.

The "DX" refers to the number dying at each age.

Q. The "Expectation" mean life expectancy, does it? A. It does.

Q. Would you continue with the description of the tables, mortality tables which you have used?

A. The next table that I have used for an illustration is the 1937 Standard Annuity Mortality Table. This annuity [63] table was derived from an investigation of group life insurance mortality covering the years 1932 to 1936. This was used for the younger ages.

For the older ages they used the American Annuity Select Male Table, rating it back two years. The results of this table——

Q. When you say "younger ages" and "older ages," so that the record may be clear, what do you mean?

A. Well, between 60 and 65 was where the two experiences merged.

Q. Yes. In other words, under 60 was the younger age?

A. Roughly speaking, yes. Actually what happened, they took one table to 65 and then took the other table back to 60 and merged the two between 60 and 65.

(Testimony of George Frank Waites.)

Q. I see. Will you proceed, please?

A. This mortality table they developed coincided with an annuity mortality investigation that they were running at the same time covering the period 1931 to 1935, I think. As a result, this table was adopted by insurance companies and actuaries and called the 1937 standard annuity table. This table has been used since 1937 and it is still used by actuaries and insurance companies as a basis for determining annuities, reserves and expectancies thereon.

However, insurance company actuaries are of the opinion that it isn't sufficiently conservative. That is [64] their experience is that people are living longer than the expectation indicated by this table.

Q. When you say "conservative" you mean——

A. From their point of view.

Q. The longevity shown by the table is less than the longevity shown by actual experience?

A. That is correct.

Q. Now you have referred here to the use of the 1937 Standard Annuity Table by insurance companies. Does that include use by leading insurance companies like Metropolitan Life Insurance Company and New York Life Insurance Company?

A. Oh, very definitely.

Q. And other leading companies?

A. Very definitely.

All the insurance companies are using it.

Q. And were using it as of April 15, 1944?

A. Oh, yes.

(Testimony of George Frank Waites.)

Q. Is this table a composite table?

A. By "composite" I presume you mean differentiating between males and females?

Q. If it differentiates then it is not a composite table, is my understanding.

A. Again, in this table they found that females were living longer than males. However, they did find that the one table again would do for both male and female lives, provided, [65] however, that the age of the female was taken at an age five years younger than the male life. So the one table does for both male and female lives with the proper adjustment.

Mr. Taylor: Mr. Clerk, I hand you a three-page photostat entitled "1937 Standard Annuity Table," and ask that you mark it for identification.

The Clerk: Exhibit 7, marked for identification only.

(The table referred to was marked as Petitioner's Exhibit No. 7 for identification.)

By Mr. Taylor:

Q. I show you Petitioner's Exhibit 7 for identification, a three-page photostat entitled "1937 Standard Annuity Table," and ask if that is the table as to which you have just testified?

A. That is the table to which I just testified.

Mr. Taylor: I offer Petitioner's Exhibit 7 into evidence.

Mr. Hurley: No objection.

The Court: Accepted in evidence.

The Clerk: No. 7.

(Testimony of George Frank Waites.)

(The table referred to, heretofore marked as Petitioner's Exhibit No. 7, for identification, was received in evidence as Petitioner's Exhibit No. 7.) [66]

[Printer's Note]: Petitioner's Exhibit No. 7 is set out in full at page 158 of this printed Record.

Mr. Taylor: There is no objection to the use of a photostat?

Mr. Hurley: No.

By Mr. Taylor:

Q. Now, before you testified as to the history and background of these tables you stated that you had prepared a tabulation showing the expectancies of life thereunder for various ages. You have that tabulation before you?

A. Yes, I have prepared that and I have it before me.

I would be glad to read it, although I believe that I left you some copies if you would like to refer to those rather than have me read them.

Mr. Hurley: If this is simply a recapitulation of the actual schedules set out in the tables in evidence, I have no objection to it going in, subject to check.

Mr. Taylor: As to accuracy.

Mr. Hurley: I will accept the photostatic copies as primary evidence, and this is simply a recapitulation of what is in **there**.

The Court: You offer this in evidence?

(Testimony of George Frank Waites.)

By Mr. Taylor:

Q. This is a recapitulation, Mr. Witness, of the tables or some of the elements in the tables?

A. May I have a look at it?

Yes, that is correct. [67]

Mr. Hurley: I have no objection in so far as it is just a recapitulation.

Mr. Taylor: I offer in evidence the document entitled "Complete Expectancies of Life Under Certain Standard Mortality Tables for Various Ages," a single page typed sheet.

The Court: Admitted in evidence.

The Clerk: Petitioner's Exhibit No. 8.

(The recapitulation referred to was marked and received in evidence as Petitioner's Exhibit No. 8.)

[Printer's Note]: Petitioner's Exhibit No. 8 is set out in full at page 161 of this printed Record.

By Mr. Taylor:

Q. What is the life expectancy under Petitioner's Exhibit 8 under the Actuaries' or Combined Experience Table for a person aged 66?

A. For a person aged 66 the life expectancy under the Combined Experience or Actuaries' Mortality Table is 10.46 years.

Q. What is it under the 1937 Standard Annuity Table for Females?

A. Under the 1930 Standard Annuity—

Q. 1937 Standard Annuity.

A. For females it is 16.9 years.

(Testimony of George Frank Waites.)

Q. And you meant the 1937 Standards?

A. Yes, the 1937 Standard Annuity Mortality Table.

Q. Is the Actuaries' or Combined Experience Table of [68] Mortality generally regarded as obsolete among actuaries and among insurance companies?

A. Yes. Its general use was discontinued by insurance companies and actuaries prior to 1900. About the only instances where it would be used now, apart from under the Regulations of the Bureau of Internal Revenue, are in some cases there may be policies that have been issued 40 or 50 years ago where it may be used for their valuation.

Q. A policy issued 40 years ago would be issued after 1900. Do you mean 50 years ago?

A. I am being conservative and saying 40 or 50 years ago. Actually its general use was discontinued prior to 1900. But it may have been used by some after that date.

Q. Now, you have referred to certain mortality tables and have given their history and their background. Why have you selected these tables?

A. I have selected these tables because all of them were standard mortality tables as of the time that they were developed, and they have been in current use from time to time, and I have used them to illustrate the fact that the expectancy of life has been continually increasing.

Q. They are tables which, as of the time they were prepared, were in widespread use?

(Testimony of George Frank Waites.)

A. At the time they were prepared, or following the time they were prepared they were in widespread use. [69]

Q. Yes. Have you determined what the present value of an annuity of \$1 per year payable for the lifetime of an annuitant aged 66 at the commencement of the annuity and assuming 4 per cent compound interest is? A. Yes.

Q. Have you prepared a table which states such factor, that is, such present value factor for each of the mortality tables which you have mentioned?

A. Yes.

Mr. Taylor: I offer in evidence a single sheet entitled "Present Values Under Various Mortality Tables of an Annuitant of \$1 per year payable for the lifetime of an annuitant age 66 at the commencement of the annuity, assuming 4 per cent compound interest."

Mr. Hurley: Counsel tells me that this exhibit is simply the witness' computation, and in so far as it is simply reduced to writing what he would testify to orally as the basis of his computation, I have no objection to the exhibit.

The Court: Accepted in evidence.

The Clerk: Exhibit No. 9.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

[Printer's Note]: Petitioner's Exhibit No. 9 is set out in full at page 162 of this printed Record.

(Testimony of George Frank Waites.)

The Court: You say a person 66 years old. Does it make any difference whether that person is a male or female?

The Witness: The value of the annuity based on a [70] person age 66 years and the expectancy depends on whether they are male or female.

Mr. Taylor: If the Court please, Petitioner's Exhibit 9 shows that where the mortality tables have differentiated that the factor is different. So it does make that difference.

By Mr. Taylor:

Q. I show you Petitioner's Exhibit 9. You will note that it says there—first it refers to assuming 4 per cent compound interest, and then it says, ("Discounting future payments upon the basis of compound interest at the rate of 4 per cent a year").

Is that statement the same as the statement assuming 4 per cent compound interest?

A. They mean the same.

Q. Yes. How did you derive this table, Petitioner's Exhibit 9? Let me rephrase the question:

Did you derive this table in accordance with established actuarial principles? A. I did.

Q. Through mathematical means?

A. Yes, by mathematical means.

Q. Can you state what the present value of an annuity of \$1 per year, payable for the lifetime of an annuitant age 66 at the commencement of the annuity and assuming 4 per cent [71] compound interest is under the Combined Experience or Actuar-

(Testimony of George Frank Waites.)

ies' Table and under the 1937 Standard Annuity, Females?

Will you state that both for annual payments and for quarterly payments, first payment at the end of the first quarter?

A. For the annual payments for the two tables that you have indicated the values are 7.525 and 10.974.

For quarterly payments the values for the same two tables are 7.900 and 11.349.

Q. Now, in the amended Petition which has been filed in this case, in Paragraph 5, sub-paragraph 8 thereof, there is a reference to a table, a factor under the Combined Experience or Actuaries' Table of 7.52476. In your table, Petitioner's Exhibit 9, you refer to the factor 7.525.

If you had carried out that factor, 7.525 two further places, would it have been 7.52476?

A. My recollection is yes. I may say that all the figures I have used are taken to three decimal places because they are merely illustrative values, and actually they go to more places than three. I have taken them to the nearest third place.

Q. Likewise in your computation, Petitioner's Exhibit 9, you refer to the factor under the 1937 Standard Annuity for Females, assuming quarterly payments, as 11.349.

In the amended Petition it is referred to as 11.34913. [72] I take it if you had carried out the factor 11.349 two further decimal places, it would be 11.34913? A. That is correct.

(Testimony of George Frank Waites.)

Q. Now, I note that you use in Petitioner's Exhibit 9 .375 as the actuarial factor for quarterly payments. The Commissioner in his regulations, Section 81.10 (i), Regulations 105, uses as the factor for quarterly payments the number 1.01488.

Will you explain why your figure is different from the Commissioner's figure?

A. The Commissioner's figure is the correct figure to use if you are dealing with an annuity that involves interest only. However, when you are dealing with an annuity that involves interest and in addition the probability of living or dying, then the correct actuarial fact is .375.

For example, now, if you had an annuity payable for 10 years certain in any event, whether or not the individual lived or died, then the use of the factor that the Commissioner used would be correct. However, if you had the same annuity that was payable only in the event that the person survived, then it would be necessary to use a factor such as I have used.

In other words, the factor of .375 that I have used recognizes that interest as well as mortality have been taken into consideration in determining the value of quarterly payments [73] from the value of annual payments.

Q. You said interest as well as mortality. You mean mortality as well as interest? A. Yes.

Q. I mean, the Commissioner recognizes interest but he doesn't recognize mortality in his factor. Is that correct?

(Testimony of George Frank Waites.)

A. That's right. The factor he uses is only an interest factor, whereas the factor of .375 involves interest and mortality.

Q. And the life estate here involves both interest and mortality? A. Yes, it does.

Q. Since it ends upon the death of Mrs. Koshland? A. Yes, it does.

Q. And the Commissioner in his factor took no recognition of the mortality aspect?

A. As far as the factor is concerned.

Q. As far as the factor for quarterly payments is concerned?

A. He has just recognized the interest element.

Q. Yes. Now, the factor which you used for quarterly payments, .375, was that used in accordance with established actuarial principles?

A. It was. That is the factor that is used by actuaries in determining quarterly payments from the value of [74] annual payments.

Q. Now, you are testifying in effect that the Commissioner is in error actuarially speaking in the use of his quarterly factor?

A. That is correct.

Q. In view of the fact that you are attacking the regulations broadside here, so to speak, will you indicate to the Court the authority for your conclusion?

A. Yes. The derivation of the factor of .375 is worked out in standard actuarial textbooks, and for this purpose I would like to refer you to what's

(Testimony of George Frank Waites.)

known as the Actuaries' Bible. That is Spurgeon "Life Contingencies."

Q. Will you indicate who published it, where it was published for the record, and also the exact name of the author?

A. This text—the author is E. F. Spurgeon, "Life Contingencies," Cambridge, published for the Institute of Actuaries at the University Press, 1929.

Q. That is the University at Cambridge in England?

A. That's right, and the derivation of this value appears on Page 129 under Section 2 of Chapter VII.

Q. It shows on Pages 128 and 129 that this formula which reaches the result .375 is derived by complex—at least complex to a lawyer—mathematical computations.

A. That's right. [75]

Mr. Taylor: I won't offer those computations in evidence, Your Honor, there is no particular point to it unless counsel wants it.

Mr. Hurley: I would just as soon not have it in the record, cluttering up the record.

Mr. Taylor: You will stipulate, though, that it is derived from complex mathematical computations from Pages 128 and 129?

Mr. Hurley: I think for purposes here, Your Honor, I think Petitioner is entitled to stand on the testimony of the expert. He apparently understands these formulas, and I have some questions to ask on cross-examination with respect to derivation of the factor, and I assume I will be satisfied

(Testimony of George Frank Waites.)

at that time. I can't very well stipulate as to his formula.

Mr. Taylor: Very well. I would like to offer in evidence, Your Honor, Pages 128 and 129 of the book "Life Contingencies" by E. F. Spurgeon, published at the University Press, Cambridge, England, and would like to ask leave to withdraw this book and to substitute photostatic copies of these pages.

The Court: No objection?

Mr. Hurley: I have no objection.

The Court: Accepted in evidence. Leave granted.

The Clerk: Exhibit 10. [76]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 10.)

[Printer's Note]: Petitioner's Exhibit No. 1 is set out in full at page 163 of this printed Record.

Mr. Taylor: At the time that I submit the photostats, Your Honor, I will give counsel for the Respondent copies thereof.

By Mr. Taylor:

Q. Now, the factors both for annual payments and for quarterly payments to which you referred in Petitioner's Exhibit 9 were determined by you from standard actuarial tables? A. Yes.

Q. And in accordance with established actuarial principles? A. That is correct.

Q. The factor which you used, .375, takes into consideration the fact that a quarterly payment

(Testimony of George Frank Waites.)

will not be made if the annuitant is dead at the time that the payment would otherwise be made. Is that correct? A. That is correct.

Q. And the factor which the Commissioner uses, 1.——

A. ——1488, I think it was.

Q. 1.01488 does not take that element of mortality into account?

A. No, it ignores it entirely.

Q. That is where its error is.

Have you read the trust created by Abraham Koshland in [77] this case, Exhibit B as amended by Exhibit C? A. Yes.

Q. And you are familiar with its provisions?

A. In general.

Q. Yes. It has been stipulated in this case that Abraham Koshland died on April 15, 1944, at the age of 75, and that Estelle W. Koshland, his widow, was 66 years of age at the time of his death.

It has been further stipulated that the fair market value of the trust estate as of the date of Abraham's death was \$231,524.64.

In your opinion, upon the basis of what mortality tables should the life estate of Mrs. Estelle W. Koshland be valued?

A. I would use the 1937 Standard Annuity Mortality Table.

Q. You are aware, of course, and were aware in answering that question that Mrs. Estelle W. Koshland has a life estate under the trust, Exhibit B as amended by Exhibit C?

(Testimony of George Frank Waites.)

A. Yes, I understand that.

Q. Now, why would you use the 1937 Standard Annuity Mortality Table, and I take it you would use the one for females?

A. Yes, I would use the one for female lives. I would use it because that is the most current standard table that [78] would reflect the expectancy of a person at this time.

Q. Was that true as of April 15, 1944?

A. That would be true as of 1944 as well.

Q. It would be true from 1937 to date?

A. Yes.

Q. Is it the table which insurance companies have found reflects most accurately the actual mortality of annuitants?

A. That has been their experience.

Q. Is the 1937 Standard Annuity Table in a widespread use?

A. Oh, yes, it is used by every insurance company and every actuary for that matter.

Q. That is true as of April 15, 1944?

A. Yes.

Q. Have you computed the value of the life estate of Estelle W. Koshland as of the date of death of her husband, April 15, 1944, at which time she was 66 years of age, on the assumption that:

1. That she would receive \$15,000 a year in quarterly payments for life; and on the assumption

2. That she will receive \$9,260.99 a year in quarterly payments for life, the first payment in each case to be made at the end of the first quarter, and

(Testimony of George Frank Waites.)

on the assumption in the case of each of these amounts that all [79] future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year?

A. Yes, under the mortality tables that we have mentioned.

Q. You say you have made such computations under the several mortality tables which you have discussed?

A. That is correct.

Q. In your testimony up to now?

A. That is correct.

Q. Now, have you made such computations with and without the factor for quarterly payments?

A. I have.

Q. What factor for quarterly payments have you used?

A. I have used the factor .375 added to the factor for annual payments.

Let me correct myself there. I said I have used the factor .375 added to the value of an annual annuity. That is what it is really.

Mr. Taylor: I will offer as an exhibit a sheet entitled "Present Values of Annuities Payable for the Lifetime of an Annuitant Age 66 at the Commencement of the Annuity Under Various Mortality Tables With 4 Per Cent Compound Interest (discounting future payments upon the basis of compound interest at the rate of 4 per cent a year)."

Mr. Hurley: I have no objection, Your Honor, subject [80] to the same qualification, that this is

(Testimony of George Frank Waites.)

simply what the witness would otherwise testify to.)

The Court: Accepted in evidence.

The Clerk: Exhibit 11.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 11.)

[Printer's Note]: Petitioner's Exhibit No. 11 is set out in full at page 165 of this printed Record.

By Mr. Taylor:

Q. I show you Petitioner's Exhibit 11 and ask you if the reference to 4 per cent compound interest means the same thing as the statement "Discounting future payments upon the basis of compound interest at the rate of 4 per cent a year"?

A. They mean the same thing.

Q. Now, will you state from this table, Petitioner's Exhibit 11, what the present value of an annuity of \$15,000 a year with payments made quarterly, first payment at the end of the first quarter, is under the Actuaries' or Combined Experience Mortality Table?

A. For \$15,000 a year, payable quarterly, the value under the combined experience or Actuaries' Mortality Table is \$118,500.

Q. Will you state what it is under the 1951 Standard Annuity Table, Female?

A. \$170,235.

Q. Well now, assuming \$9,260.99 instead of \$15,

(Testimony of George Frank Waites.)

000 as the amount of the annuity, would you state what the value is [81] under:

1. The Combined Experience or Actuaries' Tables; and under 2. The 1937 Standard Annuity, Female? A. \$73,161.82, and \$105,102.98.

Q. Now, in the amended Petition, in Paragraph 5, subparagraph 8, the value of the life estate of Estelle W. Koshland as of the date of Abraham's death is alleged to be \$170,236.95. In Petitioner's Exhibit 11 you find a value of \$170,235. Will you explain that discrepancy?

A. Yes. The reason is that in computing my value I have used the value in Exhibit 9 of 11.349 to three places of decimals. Actually, the value taken to five places is 11.34913.

Q. You mean that is the factor?

A. That the application of that factor would give you the value that you have there.

Q. So the correct value is actually \$170,236.95, the correct value of the life estate?

A. Yes. [82]

* * *

Q. Now, in some of the exhibits which have been introduced into evidence which you have prepared, there is a reference to the present value of an annuity. I underscore the word "annuity," of \$15,000 per year or of \$9,260.99 per year as the case may be, commencing upon the death of a female of the age of 66 and continuing for her life.

When you used "annuity," the word "annuity"

(Testimony of George Frank Waites.)

in those exhibits, did you mean that to mean the same as life estate?

A. The word "annuity," the actuarial meaning of the word "annuity" is a series of periodic payments, and in this case it is a series of periodic payments for the lifetime of the annuitant, and it is my understanding that the meaning of the life estate corresponds to that definition.

Q. In other words, you means it to be the same as the present value of the life estate? A. Yes.

Mr. Taylor: That is all. Your witness, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. Mr. Waites, since your most recent testimony has been with respect to the proper factor to be applied in the case of quarterly payments as distinct from annual payments I would like to ask you a couple of questions on that computation.

I have here Petitioner's Exhibit 9 in which you say that the annual factor for quarterly payments is .375. [90]

Now, the Commissioner, as you know, has used the factor 1.01488.

I would like you to read Regulations 105, Section 81.10 (i) (6), in which the factors applicable to such situations in the regulations are set out. Please read Paragraph 6 and tell me whether the factor prescribed by that subsection is actuarially sound?

A. May I ask what you mean by "actuarially sound"?

(Testimony of George Frank Waites.)

Q. Simply this—let me read sub-section 6.

“In the case of an annuity under which the decedent was entitled to receive during the life of another payments at the end of each semi-annual quarterly or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the figure in Column 2 of Table A opposite the number of years in Column 1 nearest the actual age of the person whose life measures the duration of the annuity, and then multiplying the product by the following factors: One for monthly, one for quarterly and one for semi-annual payments.”

Now, this is a formula for valuing an annuity. Your testimony this morning was on the subject of valuing an annuity when you have the payments made quarterly. This is a formula for valuing an annuity when the payments are made quarterly.

Now, I wish you to read Section 6 again, take as [91] much time as you wish, and tell me whether the formula prescribed by that section is actuarially sound, whether that factor is actuarially sound.

A. This factor of 1.01488 that you have reference to is actuarially sound as long as you are dealing with interest only. But when you are dealing with interest as well as the probability of living, then it is not actuarially sound.

Q. In other words, read the provision there of subsection 6 to yourself, where it says “For the life of another,” and of course it is related directly to the tables which are mortality tables, so that we

(Testimony of George Frank Waites.)

have involved, Mr. Waites, the life of a person and an annuity for the life of a person.

A. That is correct.

Q. So we have a circumstance as we have here, where we are concerned not only with the life of someone but with quarterly payments for the duration of that life.

Now, what is your conclusion upon the basis of that formula prescribed, regardless, of course—we are not concerned with the antiquity of the table itself, we are simply concerned with the mathematical validity of the factor used.

A. My answer is the same I gave before. That is as long as you are dealing with interest only, the factor of 1.01488 is a correct factor, it is actuarially correct. However, if you were dealing with interest as well as the possibility of living, then it is not a correct actuarial [92] factor.

Q. Sub-section (c) deals with interest as well as the probability of living. Is that correct?

A. That may be so.

Q. Will you please read it as an actuary and tell me whether it does?

Mr. Taylor: Sub-section what, Mr. Hurley?

Mr. Hurley: This is 6. Did I say "C"?

Mr. Taylor: You said "C."

Mr. Hurley: I means 6 of (i) under 81.10, Regulations 105.

A. Well, may I make an interjection at this stage?

It seems to me that irrespective of what this says

(Testimony of George Frank Waites.)

here, the mathematical or the actuarial answer would be the same.

By Mr. Hurley:

Q. Well, that is the question I am coming to. Maybe we can proceed a little further here. Your factor is a factor to be added, is that right?

A. That is correct.

Q. The factor set out in the Commissioner's regulations is to be multiplied.

A. That is correct.

Q. Both Mr. Taylor and myself confess our ignorance on matters of statistics and actuarial computations. Therefore I am asking you whether your factor which it to be added [93] and the Commissioner's factor which is to be multiplied is in effect not the same factor?

A. Oh, no, they are entirely different.

Q. Do the computations produce different results?

A. Oh, definitely.

Q. Then one must be sound and one must be unsound.

A. One is sound where you are dealing with interest alone. The other is sound when you are dealing with interest as well as the probability of living.

Q. I hate to repeat this, but would you please read 6 and take into consideration the circumstances under which that sub-section is to be applied so that you can come to the conclusion whether under those circumstances such a factor is actuarially sound.

A. Well, it seems to me that in this, that if two

(Testimony of George Frank Waites.)

and two made five, that irrespective of what it said that wouldn't be correct.

Q. I agree with you. All I want you to say is if you think this is actuarially unsound, that you state your opinion to that effect.

A. Well, my answer is the same, that the factor of 1.01488 is correct if you are dealing with an annuity that involves interest only; but when you are dealing with an annuity that involves interest and probability of living as well, then this factor is incorrect. [94]

Q. Then I ask you this, Mr. Waites: Does sub-section 6 not deal with a situation where you both have not only a question of life expectancy but also a question of interest?

A. (Examining document): Now, what was your question again?

Q. You said that such a factor as is prescribed here is sound where we have simply a question of interest?

A. That is correct.

Q. Not a question of any life expectancy?

A. That is correct.

Q. But where we have the double, you might say, question, interest for a life expectancy, that such a factor is not sound. Is that your testimony?

A. That is correct.

Q. Is it not true that sub-section 6 specifically and expressly provides for that factor in cases where we have a life expectancy involved, and an annuity for the life of someone?

A. I think it could be read to mean such. That

(Testimony of George Frank Waites.)

is, it refers to an annuity for the lifetime, but that—

Mr. Taylor: I didn't get the question and answer. Would you object, counsel, if they were read?

Mr. Hurley: Certainly not.

(Question and answer read.)

A. (Continuing): If I may be permitted—but that does [95] not mean that it would be the correct one to use when you had an annuity continuing for the lifetime of an annuitant.

The Court: In other words, Mr. Witness, you think that the regulation as interpreted to you by counsel in questioning is wrong actuarially?

The Witness: When dealing with the lifetime annuity, yes.

Mr. Hurley: If the Court please, I don't wish to interpret it. I have been insisting upon the witness himself reading and arriving at his own interpretation.

The Court: I was just thinking, Petitioner's counsel having taken a rather iconoclastic attitude toward the regulations, it wouldn't have surprised me if he had not made the point to cross-examine an actuarial witness by forcing him to read Respondent's regulation almost violates the Bill of Rights in some ways as being cruel and inhuman.

Mr. Taylor: Your Honor, our witness is an expert on mathematics, an actuary, not an expert in law.

The Court: Well, I am not denying that, but to be an expert in mathematics and still be able to

(Testimony of George Frank Waites.)

read the regulations glibly and intelligibly the first time would rank you with Einstein, perhaps, Mr. Witness.

Mr. Taylor: I will stipulate if this is what counsel wants, that the factor 1.01488 is the one that the Commissioner uses. He uses this in the 90-day letter and [96] uses it elsewhere than in sub-paragraph 6 of these regulations.

Mr. Hurley: If your Honor please, the issue is very simple. The testimony was that the factor used in the 90-day letter, the factor that was arrived at in computing deficiency in this case is a proper factor where you simply have a question of giving effect to the fact that an annuitant receives income from the annuity four times a year, and it is a different situation where the person receives it semi-annually. It is likewise a different situation where he receives it annually, simply the advantage an annuitant gets by being able to receive four payments a year instead of one payment.

Now, the factor is concededly correct in such instances. I am merely referring to one section of the Regulations in which the factor which has been used in this proceeding is described, and I merely am calling the attention of the witness that that factor is prescribed in the very instances in which the witness has stated that his factor is applicable.

Testimony is also to the effect that each factor produces different results. Now, if the witness simply wants to say that the Regulations as written are in conflict with actuarial principles I am willing to

(Testimony of George Frank Waites.)

accept that testimony, but I want to have in the record that the computation in the notice of deficiency was in pursuance to the Regulations and there was no oversight made in that the situation we have here is not a different situation than the situation prescribed [97] in the Regulations fundamentally.

Mr. Taylor: I don't think counsel correctly stated the witness' testimony, Your Honor. I simply want the record to show I disagree with his statement.

Mr. Hurley: In any event I am willing to give the witness as much time as possible simply to read eight lines of the Regulations and tell me whether that is actuarially sound.

The Court: As I understand, the witness has attempted to answer your question in this way, Mr. Hurley, and that is by saying that if the Regulation prescribes that this factor be used in cases where only the interest factor is involved, then it is correct. If it prescribes such factor to be used where not only interest but also the length of life are factors then it is wrong actuarially.

Is that correct?

The Witness: That is correct.

The Court: You do not attempt to interpret the Regulations as to whether it prescribes one way or the other?

The Witness: No.

The Court: But assuming two readings of the

(Testimony of George Frank Waites.)

Regulations, he has given his answer as an actuarial expert.

Mr. Hurley: All right, that is perfectly satisfactory. Now if I can pursue this matter one step further.

By Mr. Hurley:

Q. Not being an actuary, and perhaps you have to bear [98] with me on this analysis, the purpose of a quarterly factor or semi-annual factor as distinct from an annual factor which is no factor at all, is that right——

A. Yes, that's right.

Q. ——is that when a person receives an annuity four times a year he has the advantage over a person receiving an annuity once a year. Is that correct?

A. That is correct.

Q. Therefore, the value of that is greater than if you received it once a year. Is that correct?

A. That is correct.

Q. Now, Mr. Waites, in what respect is the value of that greater when you receive it four times a year than when you receive it once a year?

A. Are you referring to a life annuity now?

Q. Yes. A. In a life annuity——

Q. Excuse me, let me interrupt to simply—let's assume annuity for ten years.

A. Not contingent on any life or anything like that?

Q. No.

A. If it is just for a term of ten years irrespective whether the recipient is living or dead, it is merely a matter of receiving the money ahead of

(Testimony of George Frank Waites.)

time so that the person can invest the money and receive the interest on it themselves. [99] Therefore the value to that individual is greater.

Q. That is the instance that you speak of, this factor that we have here is proper?

A. That's right, yes.

Q. Now, we have another situation, a person whose life expectancy is ten years. Why should the factor in that instance be any different?

A. Because the factor—that is a life annuity that we are dealing with, and the value of the life annuity is the discounted value of the probability that he will be living at the end of each period in question. So consequently, for each payment you get a discount factor, that is interest, as well as the probability of living.

Q. In other words, when we assume that a person has a life expectancy of ten years, that is not the same assumption as the previous one that we had that we were to pay an annuity each year for ten years. Is that right? A. Oh, no, no.

Q. We have to inject another factor into it: Namely, the probability that he will be living at any particular year? A. That is correct.

Q. Is that right? A. That is correct.

Q. So that when we assume that a person has a certain life expectancy we don't proceed on the assumption that he will [100] live that long.

A. I don't think you could draw that conclusion.

Q. Is this factor applicable with any mortality

(Testimony of George Frank Waites.)

table? Is the factor identical or does it vary with the mortality table, your factor here?

A. This factor varies in the fourth decimal place between mortality tables. Taking it to three decimal places it is the same for each mortality table. That is the value that is accepted by all actuaries in determining, say, quarterly payments on the value of annual payments.

Q. So, regardless of whether the correct table to be used would be any of those that you testified concerning this morning, the factor would be substantially the same with the exception of the fourth decimal place? A. That's right, yes.

Q. Now, on the subject of the table itself, you have testified this morning concerning five or six tables that are set out in Petitioner's Exhibit 9, first being the Combined Experience or Actuaries' Table, the table that the Regulations in question here are based upon. Now, your testimony was that a number of the mortality tables in existence are obsolete.

What do you mean when you say a table is obsolete?

A. By saying that a table is obsolete I mean that in its simplest terms, that the expectancies of living at each age have changed. [101]

Q. Which of the tables that we have in evidence and to which you testified this morning are not obsolete?

A. The nearest one coming to that is the 1937 Standard Annuity Mortality Table.

(Testimony of George Frank Waites.)

Q. But it is also obsolete, is it not, by your definition?

A. Any mortality table is obsolete, the same as a car depreciates as soon as it is sold.

Q. So that so far as an up-to-date mortality table that was not obsolete, there is no such thing in general use, isn't that correct?

A. In general, yes. Although the table that has been derived from experience nearest the situation at hand is the one that might be considered the most up to date.

Q. You are familiar with insurance companies' methods of computing reserves and the basis upon which policy premiums are arrived at, are you not?

A. That's right.

Q. That is part of your business, isn't it?

A. That's right.

Q. Let me ask you, if I were to go down to an insurance company today and take out an ordinary life policy, upon what basis would the premium be computed? By that I mean what mortality table would they use?

A. That premium would be computed on a mortality table [102] that nearest approached their own experience, and to that mortality table they would add a loading for taxes, a loading for expenses, and a loading for commissions.

Q. Well, what mortality table would that be?

A. With the larger companies they use their own experience, and the mortality table isn't generally known amongst the companies. It's just based

(Testimony of George Frank Waites.)

on their own experience to date.

Q. In other words, the table of mortality that you testified to are not generally used by insurance companies in arriving at their premiums. Is that correct?

A. The 1937 Standard Annuity Table as I have testified this morning is used by all insurance companies now as a basis for annuities and things of that nature.

Q. Is it used as a basis for life insurance policies?

A. No.

Q. Just for annuities, is that correct?

A. That is correct.

Q. Isn't it true that the American Experience Table, for example, is the table prescribed by the California Insurance Code as the table by which insurance companies' reserves are to be calculated?

A. It was until last year.

Q. Until last year?

A. Yes. Mind you, that is just for reserves. [103]

Q. Yes, the American Experience Table.

A. That's right.

Q. Would you examine Petitioner's Exhibit 4 in evidence and tell me what the life expectancy according to the American Experience Table is of a person 66 years of age?

A. According to this table the life expectancy of a person aged 66 is 10.54 years.

Q. I now show you Petitioner's Exhibit 3 which is the combined or Actuaries' Experience Table on the basis of the regulations that we have in ques-

(Testimony of George Frank Waites.)

tion here. Would you tell me from examining that what the life expectancy of a person 66 would be?

A. 10.46.

Q. Very slight difference between the two, is that correct?

A. That's right. The reason for that is because one is over one hundred years old and the other is almost one hundred years old.

Q. Isn't it a fact that the American Experience Table is adopted by a number of states in this Union that have Insurance Codes covering this question as the official table upon which reserves are to be computed?

A. The majority of states have now discontinued the American Experience Table as a basis for reserves.

Q. What table do the majority of states now use so far [104] as life insurance is concerned?

A. The majority of the states now use the Commissioners' 1941 Standard Ordinary Table.

Q. And that table is not in evidence here, is that right?

A. No, that table is not in evidence.

The Court: It is true, is it not, that the more obsolete a table, provided it is used for calculating reserves, the greater reserves will be?

The Witness: Not necessarily. That is true as far as annuities are concerned. That is not necessarily true as far as life insurance is concerned.

The Court: I should think it would be. I mean, if you use an old actuarial table where the life ex-

(Testimony of George Frank Waites.)

pectancy is not as high as in the newer tables and you use that for the calculation of reserves for life insurance, life insurance reserves, you would necessarily have to get a larger amount of reserves.

The Witness: That doesn't necessarily follow. It depends on what we call the incident of the mortality. In other words, it depends just at what ages it hits.

I think possibly I could clarify the situation.

The Court: I think I see now, yes. I think I see. The reserves would be the same, but the point at which they would be gathered in would differ. Is that it? [105]

The Witness: Over the long run, yes.

The Court: I think I see, I don't know, I certainly hesitate to commit myself definitely on it.
By Mr. Hurley:

Q. Mr. Waites, do you have in your possession or in any of the texts that you have with you the Commissioners' 1941 Standard Ordinary Table of Mortality?

A. I think I can dig it up, yes. I think first of all, in using it, I had better explain something about it because none of these tables should be used without knowing a little about their background.

Now, if you would like me to proceed on that basis——

Q. As I understood it, that is the table that is used now by most states in prescribing reserves, in the mortality table used in computing reserves; is that correct?

A. That is correct, yes.

(Testimony of George Frank Waites.)

Q. Do you have the table there?

A. Yes.

As you noticed this morning, before going into the expectancies I described each mortality table on which the expectancies were derived in order to show just what factors entered into it. Now, I think it is only right that I should explain something about the Commissioners' 1941 Standard Ordinary Table to which you have referred.

Now, that table was based on another table called [106] Table "Z." Table "Z" was based on the mortality of life insurance companies for, I think it was from 1924 to 1934, something like that, and this Table "Z" corresponded to a basic table.

Now, that gave just about the actual mortality that the insurance companies were experiencing. However, the insurance companies said, "Oh, no, this won't do, because there is no leeway for us here. We want something that will give us greater mortality. At least we want a table that will give greater mortality than that shown by Table 'Z'."

For this purpose the Commissioners' 1941 Standard Ordinary table was developed, and with that as background and remembering that it is a loaded table for life insurance purposes, the expectancy is 71.01 years.

Q. That table is 1941, and it is only one year more than the table used by the Commissioner here which is less than one year difference in expectancy, is that correct?

A. That is correct.

Q. That is as late as 1941.

A. No, that is based on experience, as I indi-

(Testimony of George Frank Waites.)

cated, I think the experience ended around 1934 or 1936.

Q. I mean, the table was drawn up in 1941, and the Commissioners referred to there are the Insurance Commissioners of the various states. Is that correct? A. That is right. [107]

Q. Now, Mr. Waites, isn't it a fact that in compiling a table such as the 1937 Standard Annuity Table the table is likewise weighted the other way in favor of the insurance company, and the life expectancy is given an outside limit so that the company would not be called upon to be paying annuities far beyond what the ordinary person might be expected—the life expectancy of the ordinary person. Do you understand my question?

A. Yes, I think I understand your question.

Q. In other words, an annuity table, in order to prescribe a proper reserve for annuity purposes, you must be conservative and assume that the annuitants will outlive their life expectancy just as you testified that there is a tendency to be conservative in life insurance and assume that the man will die sooner. Isn't that a correct statement?

A. I think your question can be best answered in this manner: The nearest approach to the situation that we have on hand this morning is this: Where a man takes out insurance and provides that insurance will be payable to his wife, say, for example, in monthly installments, or periodic installments for life. Now then, in a case such as that the wife has no say in the selection of the annuity.

Testimony of George Frank Waites.)

Nevertheless, the experience under such annuities indicates that the 1937 Standard Annuity Table isn't conservative enough, they should be using it at least rated down one year, and practically all of the [108] major insurance companies now under such annuities are rating that 1937 Standard Annuity down two years, because of the fact that their annuitants are living longer.

The Court: Rating it down? I should think——

The Witness: By "rating it down" I mean if the individual's age is 64, they take the value shown at age 62. It's really setting it down rather than rating it down.

The Court: I think Mr. Hurley's question was with regard to the actuarial data used by the insurance companies themselves. Isn't it true that in life insurance policies those tables always are conservative in estimating an earlier death than perhaps the actual experience would warrant, and in case of annuities don't those tables actually used by the insurance companies in figuring their premiums assume a later death than their experience actually warrants?

The Witness: Only if you are buying an annuity from the insurance company. Under the options that I have indicated here, you are not buying an annuity, it is just one method whereby the payments are distributed.

By Mr. Hurley:

Q. I think this question will answer it, Mr. Waites:

(Testimony of George Frank Waites.)

Q. Isn't it true that insurance companies do not use annuity tables in determining life insurance rates, and similarly do not use life insurance tables in determining annuity rates?

A. That is correct. [109]

Q. In other words, Petitioner's Exhibit 9 which is a recapitulation of the various mortality tables we have in evidence, only two of these would be used by insurance companies in determining life insurance reserves or rates, the American Annuity Table, the Combined Annuity Table; and the 1958 Standard Table wouldn't be used at all for anything but annuities.

A. I would say none of those tables would be used by insurance companies in determining rates.

Q. Certainly the annuity tables would not be used for life insurance rates. Is that correct?

A. That is correct, and the American Experience Mortality Table hasn't been used for determining rates for over 40 years.

Q. You mean none of the life insurance companies have used it? A. No.

Q. Your testimony is they make up their own tables. Is that right?

A. That's right, or use the tables that approximate their actual experience.

The Court: And such a table not only reflects their actual experience so far as the life of insureds are concerned but it is also considerably loaded.

The Witness: Very definitely, because they wait

(Testimony of George Frank Waites.)

to set something aside for epidemics and things of that [110] nature.

By Mr. Hurley:

Q. Mr. Waites, isn't it true that annuitants as a group are a select class of risks? By that I mean that the experience that insurance companies have had with annuitants and with the mortality rate of annuitants is not the same experience that you may have with the average run of persons, in that people who buy annuities are convinced that they will probably at least live if not outlive their life expectancy.

A. Yes, that is why they load their annuity rate so much, because they realize that the person is selecting against them.

Mr. Hurley: I think that is all on this point.

The Court: Mr. Taylor.

Mr. Taylor: Are you through, Mr. Hurley?

Mr. Hurley: Yes.

Redirect Examination

By Mr. Taylor:

Q. Mr. Waites, you were asked a question as to whether the use of the quarterly factor .375 which you testified was the proper quarterly factor resulted in a different valuation of the life estate than the use of the factor which the Commissioner used? Now, in the 90-day letter the Commissioner used—under the Actuaries' or Combined Experience Table, the quarterly factor 1.01488 and reached the value on an annual [111] income of \$9,260.99, \$70.-23.67 for the life estate.

(Testimony of George Frank Waites.)

Now, I show you Petitioner's Exhibit 11 and ask you to read to the Court the value which you reached for an annual income of \$9,260.99 under the Actuaries' or Combined Experience Table showing with the use of the quarterly factor .375.

A. The value for the Combined Experience of Actuaries' Table is \$73,161.82.

Q. In other words, there is a substantial difference in the use of the proper quarterly factor?

A. That is correct.

The Court: I wanted to ask the witness to clear up something.

You referred in your cross-examination, I think to the Commissioners' Table. In a proceedings of this Court the use of the word "Commissioner" usually refers to the Commissioner of Internal Revenue. When you used the word "Commissioner" the Commissioners' Table, to what Commission were you referring?

The Witness: That is the name given to the table, and the reference is to the Commissioners of Insurance.

The Court: That is what I thought.

All right, Mr. Taylor.

By Mr. Taylor:

Q. How do you know, Mr. Waites, that when the Commissioner uses the factor for quarterly payments 1.01488 that he takes [112] what you call the interest only into account and not the element of mortality?

A. Well, I think I can best answer that by

(Testimony of George Frank Waites.)

ferring to a book of interest tables. I have it here. This book is Glover, Part 1, "Tables of Applied Mathematics in Finance, Insurance Statistics," edited by James W. Glover, Ph.D., Professor of Mathematics and Insurance, University of Michigan, "Compound Interest Functions and Logarithms of Compound Interest Functions" and so on, here, published by Ann Arbor, Michigan, George Wahr, Publisher, 1930.

Q. Is that a standard book used by actuaries?

A. This is a standard book used by actuaries and accountants. Part 1 refers to compound interest functions only, and on Page 6 of Part 1 under 4 per cent and for the factor relating to quarterly payments there is the factor 1.01487744.

Now, if that were taken to the nearest place to coincide with the Commissioners' value, that would be 1.01488.

And in a similar manner, I haven't checked up on the semi-annual payments and the annual—are there monthly payments there?

Mr. Hurley: Yes, monthly.

The Witness: For semi-annual payments it gives factor 1.009902, and I think that coincides with the value of the Commissioner's schedule. [113]

By Mr. Taylor:

Q. The Regulations show for semi-annual payments the factor 1.00990. So that checks with Mr. Glover.

Now, you have testified on cross-examination and on direct examination also to the value of a life

(Testimony of George Frank Waites.)

annuity. That is the same as life estate, when you referred to Mrs. Koshland, is it not?

A. Yes.

Q. When you refer to life annuity in general here, you considered that the same as life estate?

A. Yes.

Q. Now, you testified in cross-examination, I believe you said any table is obsolete the same as an automobile depreciates as soon as it is sold. So the next day it is not quite as good, is second-hand.

Now, there are a good many mortality tables other than the ones that have been testified to here, are there not?

A. Oh, yes, there are numerous other mortality tables.

Q. And as an actuary in the course of your work you are familiar with a great many of them?

A. That is true.

Q. In fact, you are familiar with all of the ones that are in use? A. Yes, that is true.

Q. Now, it is necessary as a practical matter to use some [114] mortality table, isn't it?

A. Oh, that is correct.

Q. And it is in accordance with established actuarial principles to use the most accurate one, that is, the one that most correctly reflects current experience, even though in a sense longevity may have increased since it was made?

A. That's right. As actuaries we always try to use the most current mortality table that will reflect the experience that we have to deal with.

(Testimony of George Frank Waites.)

Q. Now Mr. Hurley questioned you about the Commissioners' 1941 Ordinary Table. Is that the name?

A. The Commissioners' 1941 Standard Ordinary Table is the correct name.

Q. Will you state why you used the 1937 Standard Annuity Table in your consideration of this case?

A. There are two reasons. Well, the main reason is this: That the 1937 Standard Annuity Mortality Table reflects the most current experience that there is on annuitants, and that is borne out, as I indicated to Mr. Hurley, by the life insurance companies' experience with beneficiaries who have been elected by insureds to have their proceeds payable in monthly installments. Their statistics indicate that the 1937 Standard Annuity Mortality Table is not any too conservative for the payments of those proceeds, and installments in the form of a life annuity. [115]

Q. Let me make sure we understand it. You mean in a case where the person has taken out a life insurance policy and he dies, and under the policy there has been an election to pay the proceeds in installments over the lifetime of the beneficiary, the table which the insurance companies use to determine the amount of those installments is the 1937 Standard Annuity Table?

A. In most cases they use that table as a basis, but for current policies they are using it at one age lower, and in many cases at two ages lower.

(Testimony of George Frank Waites.)

Q. Was that true in 1944?

A. In 1944 I would say that they would be using it just as the Standard Table, with no reduction in age.

Q. When you say they use it one age lower or two ages lower, you mean they would take a female age 66, for example, and treat her as a female age 64 for the purpose of determining the amount to be paid her? A. That is correct, yes.

Q. And is the reason for that that their experience has been that, say, females age 66, and people in general live actually longer than the life expectancy indicated by the 1937 Standard Annuity Table? A. That is the way it is working out.

Q. And the table then in actual experience is not conservative enough, is it, in that longevity is actually in excess [116] of life expectancy indicated—the longevity of people is actually in excess of the life expectancy indicated in the table?

A. That is the experience of life insurance companies.

Q. Now, in the ordinary case no physical examination is needed to take out an annuity, is there?

A. Oh, no.

Q. They are issued by insurance companies without regard to the physical condition?

A. That is correct.

Q. The physical condition of the annuitant, and solely on the basis of the life expectancies as worked out in, say, tables like the 1937 Standard Annuity Table?

(Testimony of George Frank Waites.)

A. On the basis of the annuities based on the 1937 Standard Annuity Mortality Table.

Q. Now, I asked you, Mr. Waites, why you used this 1937 Standard Annuity Mortality Table in your consideration of this case. You were familiar, of course, with the 1941 Commissioners' Table?

A. Oh, yes.

Q. Will you indicate why you did not use that?

A. The reason I did not use the Commissioner's 1941 Standard Ordinary Table is that it is loaded. By "loaded," it assumes that there is going to be—well, a shorter life expectancy at each age. It is deliberately created that way [117] because it is used for life insurance.

Q. And the insurance companies anticipate that the loading does not hurt their client, so to speak, because they get the excess back out of dividends?

A. If it is a participating company.

Q. Did you consider the Commissioners' 1941 Table as a table based on the desire of insurance companies in life insurance matters to have an extra margin of safety rather than a table based on actual experience in connection with mortality?

A. Would you remind repeating that question?

Mr. Hurley: If the Court please, this might be an opportune time to object to the line of examination. Counsel has been consistently leading the witness.

Mr. Taylor: Your Honor——

The Court: Counsel will be cautioned.

Go ahead, rephrase your question. Evidently you

(Testimony of George Frank Waites.)

didn't lead him very successfully, since the witness asked for the question to be repeated.

Go ahead.

Mr. Taylor: I wish I were more of an actuary and I would be glad to accommodate Mr. Hurley.

The Court: Go ahead, Mr. Taylor.

Mr. Taylor: Would you repeat the question for the witness.

(Question read.) [118]

A. That is correct. In other words, I think I can clarify it a little. I will repeat what I said before.

The reason I did not use the Commissioners' 1941 Standard Ordinary Table is because it does not reflect current mortality inasmuch as it has a loading in it to provide for the hazard of greater number of deaths that might be indicated.

By Mr. Taylor:

Q. To take care of events such as epidemics, is that your point?

A. Yes, epidemics, accidents and catastrophes, things of that nature.

Q. Yes. Your failure to use that table was not an oversight then?

A. Oh, no. I deliberately avoided using it for that reason.

Q. Because you didn't think it applicable?

A. No, no. It's not applicable under any circumstances. I wouldn't think.

Q. Now, Mr. Hurley questioned you as to whether the 1937 Standard Annuity Table might

(Testimony of George Frank Waites.)

not be what you call "loaded" in favor of longer life for annuitants. Isn't it a fact, or is it a fact that actual experience since 1937 indicates that the longevity rate among all classes is in excess of that, and among all ages is in excess of that set forth in the 1937 Table for Expectancy of Life? [119]

A. Yes. People are living longer than that indicated under that table.

Q. So that table, if anything, is not loaded enough, is it, in favor of longevity?

A. Not for annuitants.

Q. And hence the insurance companies in the selling of annuities use that table but treat the applicants as having a lesser age than they actually have, in determining the rates?

A. And in addition to that—

Q. Is that correct?

A. That is correct. And in addition, they add other amounts to it to provide for any other contingencies that might arise.

Q. In other words, the loading is not in the table but the loading is in addition to the table?

A. That is correct.

Mr. Taylor: Your witness.

Recross-Examination

By Mr. Hurley:

Q. You say that the expectancy shown on an annuity table represents the actual life expectancy of an annuitant without any safety factor or loading at all? For example, I think that that table, the 1937

(Testimony of George Frank Waites.)

table shows a life expectancy of about 16 years for a woman of 66 years of age?

A. That is correct. [120]

Q. And you say that that represents actual experience, and there is no loading whatever in the table itself?

A. That is the experience of life insurance companies who are issuing a great many of them.

Q. That is the experience of life insurance companies? A. Companies.

Q. Is that life expectancy the actual life expectancy without any loading? A. Yes.

Q. Then let me ask you this question: What about life insurance tables that are, as you testified, loaded the other way? Then the loading does not in those cases appear in the tables either?

A. Oh, no, the loading appears in those tables.

Q. Can you explain the reason why in one instance the safety loading is not in the table, and in the other instance it is?

A. It depends what you are talking about. We have been talking about a number of things. A few minutes ago we were talking about reserves, and as a basis for reserves the Commissioners' Table is used in determining reserves and cash values, and in the Commissioners' Table the loading is in the table.

Now, the leading life insurance companies in building up their premiums, they use what they consider a true mortality [121] table, a table which they expect to reflect accurately their conditions,

(Testimony of George Frank Waites.)

and then they start loading that. They load it for all of the various contingencies that may arise. They load it for expenses, they load it for taxes, they load it for commissions. The result is the premium that you actually get quoted in that rate book.

Q. Then the loading does not start with the 1937 Table, but the loading starts with the insurance company's own table, is that correct?

Mr. Taylor: Do you mean the 1941 Table?

Mr. Hurley: I mean the 1937 Annuity Table.

A. I think we are talking about two different things. I am talking about the Standard Table, the Commissioners' Standard Ordinary Table. That is what we consider a standard table.

Mr. Taylor: Is that the 1941 one?

The Witness: Yes, the Commissioners' 1941.

By Mr. Hurley:

Q. The Insurance Commissioners' 1941 Table, is that what you are referring to?

A. Is the Commissioners' 1941 Standard Ordinary Table—what was the question?

Q. The question is simply this: That the 1937 Annuity Table reflects the experience of the company with annuitants plus a loading factor, and the life insurance tables reflect [122] life insurance experience plus a loading factor. That is, they are both similarly loaded for conservative insurance practice. Is that right? A. Substantially so.

Q. One further question on this factor and perhaps we can leave that.

I would like to pose a hypothetical question, Mr.

(Testimony of George Frank Waites.)

Waites, the same hypothetical question I posed before. Perhaps I didn't understand your answer correctly.

We have an annuity payable for a period of ten years, so much per year on an annual basis. Now, we apply no factor to that situation because it is computed on an annual basis.

Now, we have the same annuity computed on a quarterly basis because the annuity is payable quarterly, and we make an adjustment using the factor which we have mentioned before, 1.01488, which accounts for the difference between an annuity due once a year and an annuity due four times a year. Is that correct? A. That is correct.

Q. The use of money sooner and quicker than you would get it on an annual basis——

A. Provided the annual one is payable, first payment for the end of the year, I should say.

Q. Yes. Now, as I understand it, when we have a situation with a person with a ten-year life expectancy instead of [123] a term certain, we don't use the factor for quarterly payments but we use another factor which reflects the circumstance that we now have, namely, that the person may not live his life expectancy, is that correct, and then we arrive at that factor, .375, the factor that you used in arriving at your computation?

A. The factor of .375 is used for a life annuity.

Q. Yes, I understand. But I am assuming in this instance a person whose life expectancy would be ten years.

(Testimony of George Frank Waites.)

A. All right. Then if a person has a life expectancy of ten years the factor would be used just the same, for this reason: Possibly no payment might be received if they died between the inception of the annuity and the end of the first quarter. Therefore you will find that the factor of .375 is larger than the factor that you have there for the same reason that the annuity for a person whose life expectancy is ten years is smaller than the annuity that is payable over a term certain of ten years.

Q. In other words, in valuing, 1. An annuity for ten years term certain on a quarterly basis; and 2. Valuing an annuity for the life of a person with a ten-year expectancy, the value of the first annuity for the term certain on a quarterly basis would be more than the value of the annuity for a ten-year life expectancy. Isn't that logical, because you would be assured—— [124]

A. I think that is correct.

Q. Isn't that correct?

A. I think that is correct.

Mr. Taylor: May I have that question read?

Mr. Hurley: Would you read the question?

(Question read.)

By Mr. Hurley:

Q. In other words, the dispute as to the factor here, Mr. Waites, the Government has used one factor, you in your computation here have used another factor based upon what you say is the additional circumstance, namely, that the annuitant her-

(Testimony of George Frank Waites.)

self would not live her life expectancy. Is that right?

A. Oh, no, no, because you are confused between a term certain and expectancy. A life annuity isn't based on the expectancy. A life annuity is a series of payments depending on the probability that the individual is alive at the end of each year, discounted back at the rate of interest that is assumed.

Q. Yes, but I may be confused indeed——

A. The expectancy has nothing to do with the life annuity. They are two different things, just the same way that——

Q. When you value an annuity you use as a basis for that valuation the expectancy of the annuitant?

A. Oh, no, no. [125]

Q. I am certainly confused on this point.

A. Because the expectancy and the life annuity are two different things, just like a fried egg is different from a poached egg.

Q. But they are both eggs, and we have a question here of valuing an annuity, and I assumed that we were proceeding upon the fact that she had a certain life expectancy in arriving at that value.

A. But in determining the value of a life annuity you do not use the expectancy. You use the probability that that person will be alive at the end of each year for the remainder of the table.

Q. In other words, the life expectancy of a person has nothing whatsoever to do with the value of the annuity. Is that correct?

(Testimony of George Frank Waites.)

A. Very indirectly. The only relation it has is that it comes from the same basic mortality table.

Q. So the mere fact that a person has a certain life expectancy under your 1937 Annuity Code wouldn't indicate in any respect the value of the annuity itself, and the mere fact that one table reflects the life expectancy of ten years and another one seven years, has nothing to do with it?

A. The only thing that would indicate, because as the expectancy grows, naturally the life annuity grows.

Q. Yes, I understand. [126]

Now, will you explain as simply as possible, because I am obviously confused, on this factor business, would you explain as simply as possible how the fact that a person may die before he received all of his quarterly payments, how that operates to increase the value of such an annuity rather than decrease it? That is, why this added factor which you have injected into the Commissioners' determination which only refers to the interest, as we have agreed, why that added factor which comes in, why that doesn't operate to reduce the value of the life annuity rather than increase the value of the life annuity?

A. Well, the only explanation for that really is in its mathematical derivation. That is an accepted mathematical fact which is proved in the textbook to which we referred this morning.

Now, possibly the simplest explanation in layman's language is this: That in the first year for the

(Testimony of George Frank Waites.)

first quarter you almost have a certainty of receiving it, the first quarterly payment. But on the last payment at the end of the table you practically have no chance of receiving it at the end of the mortality table, so that the averaging up of these gives the factor that we have here, .375.

Q. That is exactly what I understood. In other words, the fact is that the life tenants, so to speak, will not assuredly live out that period; therefore, the value of the [127] life estate actually is less than if she were certain to live out her life expectancy, so that the factor that you apply here——

A. I am not sure that that is altogether true. I wonder if you would reword the question again?

Q. Well, now, I hate to take the Court's time here, but I am searching for a logical basis for the application of this factor. The witness' testimony is to the effect that the possibility of the life tenant dying somewhere along the line is a possibility which must be reckoned with mathematically, and that accounts for an additional factor which must be taken.

The Court: It increases the value according to one computation, from \$70,000 to \$73,000.

Mr. Hurley: Yes, and actually it is, as I see it, logically that circumstance should operate to reduce the value of the life estate, because that is a contingency which would almost certainly reduce the value rather than to increase it. I am not at all certain, I can't see a logical basis for it.

The Witness: The factor itself has to be taken

(Testimony of George Frank Waites.)

into consideration together with the value of the annuity itself. In other words, if I might refer to—I have forgotten some of my theory behind this, if I might refer to this thing here——

Mr. Taylor: You mean “Life Contingencies”?

The Court: Gentlemen, we don’t have time for this. [128] We will call a recess right now and you study your lesson during the recess.

(Short recess.)

Mr. Hurley: If Your Honor please, I would like to ask the witness one more question.

The Court: All right.

By Mr. Hurley:

Q. Mr. Waites, is the difference between the quarterly factor 1.01488 used by the Commissioner in the Notice of Deficiency, and the factor used by you, .375, the mathematical result of giving effect to the possibility that the annuitant might die before she received all of the quarterly payments? Just simply answer yes or no.

A. May I have the question again?

Mr. Hurley: Would you read the question?

(Question read.)

A. I wonder if you would break your question into two parts there.

By Mr. Hurley:

Q. Well, may I ask this: Did you have an opportunity to get into the text there a little further so that you could elucidate on my last question before recess? A. Oh, yes, yes.

(Testimony of George Frank Waites.)

Q. Then maybe we can go back just for a moment. What I am interested in is how the factor used results in a greater [129] value where you take into account the fact that the annuitant may die within this period. That is the question.

A. You are referring to the quarterly factor?

Q. Yes.

A. Well, that is directly related to the question of the factor against which it is applied. Now, take, for instance, if you had a life with an expectancy of ten years. Now then, the life annuity based on that, shall I say expectancy, of ten years, is lower in value than an annuity based on interest alone for the same period. Have you got that?

Q. Exactly. That was the conclusion I was endeavoring to reach.

A. Therefore, there is a larger quarterly factor applicable against that life annuity to make up for the fact that there is a larger probability of receiving the payments in the early part of the annuity.

Q. Very well. I understand exactly the position you are taking on this. Now, let me ask you one further question.

Is an annuity such as we have here for life worth more or less than a similar annuity for a term certain, measured by the same person's life expectancy? A. The life annuity is always——

Q. Assuming quarterly payments.

A. The life annuity—let's assume annual payments. The life annuity, assuming annual payments,

(Testimony of George Frank Waites.)

is always less than [130] the annuity certain for the expectancy.

Q. How about the situation with quarterly payments?

A. That depends on the rate of interest involved.

Q. Assuming the same rate of interest in both instances.

A. Also the age involved. At age 66 the effect is greater.

Q. More—what do you mean by that? The life estate is worth more, or is it worth less?

A. Well, you have to remember that the factor that you are using multiplies; whereas, the correct actuarial factor adds. So, the result is dependent on the number that you multiply by.

Q. Obviously. Is it more or less, however, with a life estate rather than an annuity for a term of years in this instance, at age 66?

A. At age 66 the factor for quarterly payments gives a larger result. That is, the true actuarial factor for quarterly payments derived from a life annuity is larger than the factor, the Commissioner's factor that you have there.

Q. In other words, you use a different factor with different years, that is, with different ages?

A. No. The factors are the same, but the result, the final result is dependent upon the number that you multiply the factor by in your case. [131]

Mr. Hurley: I have no further questions.

(Testimony of George Frank Waites.)

Redirect Examination

By Mr. Taylor:

Q. Mr. Waites, the 1941 Commissioners' Table is not used in determining the value of life estates or annuities?

A. I have never known it to be used. I have never used it myself.

Q. The answer is "No," is it? A. "No."

Q. Its use is by some life insurance companies in determining rates for life insurance policies?

A. As I indicated, they use their own tables for determining their rates.

Q. This table is used by them in determining their reserves?

A. It is used as a standard for reserves and valuations.

The Court: Now we are getting repetitious, aren't we? I think the witness already testified along that line. As I understood him to testify, it was used in determining reserves.

The Witness: That's right.

Mr. Taylor: I am simply leading up to the point, meeting some of the points which Mr. Hurley raised in his examination. I will try to keep this as succinct as I can.

By Mr. Taylor: [132]

Q. The 1941 Commissioners' Table is loaded by the insurance companies because they want larger reserves as a matter of safety? A. Yes.

Q. And the 1937 Standard Annuity Table, the experience, actual life experience under that, has

Testimony of George Frank Waites.)

Q. Is that longevity is in excess of that estimated under that table?

A. That is true, for annuitants.

The Court: That is repetitious.

Mr. Taylor: If Your Honor will bear with me, I must want to lead to this question:

By Mr. Taylor:

Q. So there is no loading under the 1937 Standard Annuity Table?

A. Oh, no. The 1937 Standard Annuity Table doesn't have any loading in it at all.

Q. All right now, Mr. Waites, is there a connection between life expectancies and the value of a life estate? Life expectancy and the value of a life estate?

A. If you mean value of annuity there, the connection is that they are both derived from the same mortality table.

Q. Will you indicate, is it an indispensable and inevitable connection?

A. Oh, yes, very definitely.

Q. Will you indicate just what that connection is? [133]

A. If the life expectancy increases, very definitely the life annuity also increases.

Q. So that in determining the valuation of a life annuity or the valuation of a life estate the life expectancy is most material and important?

A. As a guide in determining whether the annuity value is going to increase or not between tables.

(Testimony of George Frank Waites.)

Q. By "life annuity" do you mean the same as "life estate"? A. Yes.

Q. Well, now, will you indicate what that connection is?

A. The life expectancy can be described in two or three ways. One way of looking at it is that it is just the sum of the probability of living, sum to the end of the mortality table.

Another way of looking—its mathematical computation is as follows: If you refer to a mortality table, if you take the Column headed "Number Living" and sum that to the end of the table and then divide by the number living at the age, that would give you your expectancy.

Now, a life annuity is based on, as I indicated before, the probability of living, of being alive at the end of each period, discounted back. That gives the present value of it.

Q. Does the life expectancy enter into the probability [134] of being alive at the end of each period? A. Indirectly it does enter into it.

Q. What do you mean by "indirectly"?

A. Well, in the first place the life expectancy may be viewed as annuity at a zero rate of interest. In other words, if you have had no interest at all and if you had a payment of 1 per annum, then your life expectancy would give you the value of each of those payments.

Q. Would your life expectancy then be the same as the life annuity?

Testimony of George Frank Waites.)

A. It would be the same as the life annuity if you had applied the interest factor to it.

Q. I thought you said there was no interest factor in it.

A. There is no interest factor in the life expectancy. But if you apply the interest factor to the probability of being alive at the end of each year, then you would have your annuity.

Q. A life annuity then is the life expectancy with the interest factor applied thereto?

A. Yes, for each year.

Q. So that the life expectancy is an indispensable part of the life annuity? A. Yes.

Q. So that as the life expectancy increases the valuation [135] of the life annuity automatically increases? A. Oh, very definitely, yes.

Q. And so that where, under the mortality tables introduced into evidence, it would show an increase in the life expectancy, that would automatically result in an increase of the value of the life state or of the life annuity?

A. Oh, very definitely, yes.

Mr. Taylor: No further questions.

Mr. Hurley: That is all.

The Court: That is all.

(Witness excused.)

The Court: Petitioner rests?

Mr. Taylor: Petitioner rests.

Mr. Hurley: Respondent rests.

* *

[Endorsed]: Filed Apr. 12, 1948. [136]

PETITIONER'S EXHIBIT No. 3

Table XXII.

COMBINED EXPERIENCE TABLE OF
MORTALITY

Age	lx	dx	Expectation
10.....	100,000	676	48.36
11.....	99,324	674	47.68
12.....	98,650	672	47.01
13.....	97,978	671	46.33
14.....	97,307	671	45.64
15.....	96,636	671	44.96
16.....	95,965	672	44.27
17.....	95,293	673	43.58
18.....	94,620	675	42.88
19.....	93,945	677	42.19
20.....	93,268	680	41.49
21.....	92,588	683	40.79
22.....	91,905	686	40.09
23.....	91,219	690	39.39
24.....	90,529	694	38.68
25.....	89,835	698	37.98
26.....	89,137	703	37.27
27.....	88,434	708	36.56
28.....	87,726	714	35.86
29.....	87,012	720	35.15
30.....	86,292	727	34.43
31.....	85,565	734	33.72
32.....	84,831	742	33.01
33.....	84,089	750	32.30
34.....	83,339	758	31.58
35.....	82,581	767	30.87
36.....	81,814	776	30.15
37.....	81,038	785	29.44
38.....	80,253	795	28.72
39.....	79,458	805	28.00
40.....	78,653	815	27.28
41.....	77,838	826	26.56
42.....	77,012	839	25.84
43.....	76,173	857	25.12

Petitioner's Exhibit No. 3—(Continued)

Age	lx	dx	Expectation
44.....	75,316	881	24.40
45.....	74,435	909	23.69
46.....	73,526	944	22.97
47.....	72,582	981	22.27
48.....	71,601	1,021	21.56
49.....	70,580	1,063	20.87
50.....	69,517	1,108	20.18
51.....	68,409	1,156	19.50
52.....	67,253	1,207	18.82
53.....	66,046	1,261	18.16
54.....	64,785	1,316	17.50
55.....	63,469	1,375	16.86
56.....	62,094	1,436	16.22
57.....	60,658	1,497	15.59
58.....	59,161	1,561	14.97
59.....	57,600	1,627	14.37
60.....	55,973	1,698	13.77
61.....	54,275	1,770	13.18
62.....	52,505	1,844	12.61
63.....	50,661	1,917	12.05
64.....	48,744	1,990	11.51
65.....	46,754	2,061	10.97
66.....	44,693	2,128	10.46
67.....	42,565	2,191	9.96
68.....	40,374	2,246	9.47
69.....	38,128	2,291	9.00
70.....	35,837	2,327	8.54
71.....	33,510	2,351	8.10
72.....	31,159	2,362	7.67
73.....	28,797	2,358	7.26
74.....	26,439	2,339	6.86
75.....	24,100	2,303	6.48
76.....	21,797	2,249	6.11
77.....	19,548	2,179	5.76
78.....	17,369	2,092	5.42
79.....	15,277	1,987	5.09
80.....	13,290	1,866	4.78
81.....	11,424	1,730	4.48
82.....	9,694	1,582	4.18

Petitioner's Exhibit No. 3—(Continued)

Age	lx	dx	Expectation
83.....	8,112	1,427	3.90
84.....	6,685	1,268	3.63
85.....	5,417	1,111	3.36
86.....	4,306	958	3.10
87.....	3,348	811	2.84
88.....	2,537	673	2.59
89.....	1,864	545	2.35
90.....	1,319	427	2.11
91.....	892	322	1.89
92.....	570	231	1.67
93.....	339	155	1.47
94.....	184	95	1.28
95.....	89	52	1.12
96.....	37	24	.99
97.....	13	9	.89
98.....	4	3	.75
99.....	1	1	.50

 PETITIONER'S EXHIBIT No. 4

Appendix B
MORTALITY TABLES
American Experience Table

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
10	100,000	749	.007490	48.72
11	99,251	746	.007516	48.08
12	98,505	743	.007543	47.45
13	97,762	740	.007569	46.80
14	97,022	737	.007596	46.16
15	96,285	735	.007634	45.50
16	95,550	732	.007661	44.85
17	94,818	729	.007688	44.19
18	94,089	727	.007727	43.53
19	93,362	725	.007765	42.87

Petitioner's Exhibit No. 4—(Continued)

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
20	92,637	723	.007805	42.20
21	91,914	722	.007855	41.53
22	91,192	721	.007906	40.85
23	90,471	720	.007958	40.17
24	89,751	719	.008011	39.49
25	89,032	718	.008065	38.81
26	88,314	718	.008130	38.12
27	87,596	718	.008197	37.43
28	86,878	718	.008264	36.73
29	86,160	719	.008345	36.03
30	85,441	720	.008427	35.33
31	84,721	721	.008510	34.63
32	84,000	723	.008607	33.92
33	83,227	726	.008718	33.21
34	82,551	729	.008831	32.50
35	81,822	732	.008946	31.78
36	81,090	737	.009089	31.07
37	80,353	742	.009234	30.35
38	79,611	749	.009408	29.62
39	78,862	756	.009586	28.90
40	78,106	765	.009794	28.18
41	77,341	774	.010008	27.45
42	76,567	785	.010252	26.72
43	75,782	797	.010517	26.00
44	74,985	812	.010829	25.27
45	74,173	828	.011163	24.54
46	73,345	848	.011562	23.81
47	72,497	870	.012000	23.08
48	71,627	896	.012509	22.36
49	70,731	927	.013106	21.63
50	69,804	962	.013781	20.91
51	68,842	1,001	.014541	20.20
52	67,841	1,044	.015389	19.49
53	66,797	1,091	.016333	18.79
54	65,706	1,143	.017396	18.09
55	64,563	1,199	.018571	17.40
56	63,364	1,260	.019885	16.72
57	62,104	1,325	.021335	16.05

Petitioner's Exhibit No. 4—(Continued)

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
58	60,779	1,394	.022936	15.39
59	59,385	1,468	.024720	14.74
60	57,917	1,546	.026693	14.10
61	56,371	1,628	.028880	13.47
62	54,743	1,713	.031292	12.86
63	53,030	1,800	.033943	12.26
64	51,230	1,889	.036873	11.67
65	49,341	1,980	.040129	11.10
66	47,361	2,070	.043707	10.54
67	45,291	2,158	.047647	10.00
68	43,133	2,243	.052002	9.47
69	40,890	2,321	.056762	8.97
70	38,569	2,391	.061993	8.48
71	36,178	2,448	.067665	8.00
72	33,730	2,487	.073733	7.55
73	31,242	2,505	.080178	7.11
74	28,738	2,501	.087028	6.68
75	26,237	2,476	.094371	6.27
76	23,761	2,431	.102311	5.88
77	21,330	2,369	.111064	5.49
78	18,961	2,291	.120827	5.11
79	16,670	2,196	.131734	4.74
80	14,474	2,091	.144466	4.39
81	12,383	1,964	.158605	4.05
82	10,419	1,816	.174297	3.71
83	8,603	1,648	.191561	3.39
84	6,955	1,470	.211359	3.08
85	5,485	1,292	.235552	2.77
86	4,193	1,114	.265681	2.47
87	3,079	933	.303020	2.18
88	2,146	744	.346692	1.91
89	1,402	555	.395863	1.66
90	847	385	.454545	1.42
91	462	246	.532468	1.19
92	216	137	.634259	.98
93	79	58	.734177	.80
94	21	18	.857143	.64
95	3	3	1.000000	.50

PETITIONER'S EXHIBIT No. 5

AMERICAN ANNUITANTS' TABLE
(ULTIMATE)

Male

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
25	100,000	431	.00431	41.71
26	99,569	440	.00442	40.89
27	99,129	451	.00455	40.07
28	98,678	462	.00468	39.25
29	98,216	474	.00483	38.44
30	97,742	488	.00499	37.62
31	97,254	502	.00516	36.81
32	96,752	518	.00535	35.99
33	96,234	534	.00555	35.18
34	95,700	551	.00576	34.37
35	95,149	571	.00600	33.57
36	94,578	592	.00626	32.77
37	93,986	615	.00654	31.98
38	93,371	639	.00684	31.18
39	92,732	664	.00716	30.40
40	92,068	691	.00751	29.61
41	91,377	722	.00790	28.83
42	90,665	753	.00831	28.06
43	89,902	788	.00877	27.29
44	89,114	823	.00924	26.53
45	88,291	863	.00978	25.77
46	87,428	904	.01034	25.02
47	86,524	949	.01097	24.27
48	85,575	997	.01165	23.54
49	84,578	1,045	.01236	22.81
50	83,533	1,098	.01315	22.09
51	82,435	1,154	.01400	21.38
52	81,281	1,214	.01493	20.67
53	80,067	1,274	.01591	19.98
54	78,793	1,340	.01701	19.29
55	77,453	1,407	.01817	18.62
56	76,046	1,478	.01944	17.95

Petitioner's Exhibit No. 5—(Continued)

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
57	74,568	1,552	.02081	17.30
58	73,016	1,628	.02230	16.66
59	71,388	1,706	.02390	16.02
60	69,682	1,788	.02566	15.40
61	67,894	1,869	.02753	14.80
62	66,025	1,952	.02956	14.20
63	64,073	2,035	.03176	13.62
64	62,038	2,119	.03415	13.05
65	59,919	2,201	.03673	12.49
66	57,718	2,280	.03950	11.95
67	55,438	2,356	.04250	11.42
68	53,082	2,430	.04577	10.91
69	50,652	2,496	.04927	10.41
70	48,156	2,555	.05305	9.92
71	45,601	2,607	.05716	9.45
72	42,994	2,646	.06155	8.99
73	40,348	2,675	.06631	8.55
74	37,673	2,692	.07145	8.12
75	34,981	2,693	.07698	7.70
76	32,288	2,679	.08296	7.30
77	29,609	2,645	.08933	6.92
78	26,964	2,595	.09625	6.55
79	24,369	2,527	.10370	6.19
80	21,842	2,439	.11165	5.85
81	19,403	2,333	.12023	5.52
82	17,070	2,209	.12939	5.21
83	14,861	2,069	.13925	4.91
84	12,792	1,917	.14985	4.63
85	10,875	1,752	.16112	4.35
86	9,123	1,580	.17322	4.09
87	7,543	1,403	.18606	3.85
88	6,140	1,227	.19977	3.61
89	4,913	1,054	.21445	3.39
90	3,859	888	.23004	3.17
91	2,971	733	.24675	2.97
92	2,238	591	.26397	2.78
93	1,647	466	.28272	2.60
94	1,181	357	.30207	2.43

Petitioner's Exhibit No. 5—(Continued)

Age	Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
95	824	266	.32306	2.27
96	558	192	.34426	2.12
97	366	134	.36667	1.97
98	232	91	.39035	1.81
99	141	59	.41727	1.66
100	82	37	.45679	1.50
101	45	23	.50000	1.32
102	22	12	.54545	1.18
103	10	6	.60000	1.00
104	4	3	.75000	.75
105	1	1	1.00000	.50

PETITIONER'S EXHIBIT No. 6

COMBINED ANNUITY TABLE

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
10	14	100,000	153	.00153	58.10
11	15	99,847	157	.00157	57.19
12	16	99,690	161	.00162	56.28
13	17	99,529	164	.00165	55.37
14	18	99,365	168	.00169	54.46
15	19	99,197	173	.00174	53.55
16	20	90,024	177	.00179	52.64
17	21	98,847	183	.00185	51.74
18	22	98,664	188	.00191	50.83
19	23	98,476	194	.00197	49.93
20	24	98,282	201	.00205	49.02
21	25	98,081	207	.00211	48.12
22	26	97,874	210	.00215	47.22
23	27	97,664	213	.00218	46.32
24	28	97,451	214	.00220	45.42
25	29	97,237	216	.00222	44.52
26	30	97,021	216	.00223	43.62
27	31	96,805	217	.00224	42.72

Petitioner's Exhibit No. 6—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectatio of Life
Male	Female				
28	32	96,588	219	.00227	41.81
29	33	96,369	223	.00231	40.91
30	34	96,146	227	.00236	40.00
31	35	95,919	234	.00244	39.09
32	36	95,685	244	.00255	38.19
33	37	95,441	257	.00269	37.28
34	38	95,184	274	.00288	36.28
35	39	94,910	294	.00310	35.49
36	40	94,616	318	.00336	34.60
37	41	94,298	343	.00364	33.71
38	42	93,955	371	.00395	32.83
39	43	93,584	401	.00428	31.96
40	44	93,183	432	.00464	31.10
41	45	92,751	467	.00503	30.24
42	46	92,284	503	.00545	29.39
43	47	91,781	542	.00590	28.55
44	48	91,239	583	.00639	27.71
45	49	90,656	628	.00693	26.89
46	50	90,028	676	.00751	26.07
47	51	89,352	727	.00814	25.27
48	52	88,625	782	.00882	24.47
49	53	87,843	839	.00955	23.68
50	54	84,004	900	.01035	22.91
51	55	86,104	965	.01121	22.14
52	56	85,139	1,034	.01215	21.39
53	57	84,105	1,107	.01316	20.64
54	58	82,998	1,184	.01426	19.91
55	59	81,814	1,264	.01545	19.19
56	60	80,550	1,348	.01673	18.49
57	61	79,202	1,435	.01812	17.79
58	62	77,767	1,527	.01963	17.11
59	63	76,240	1,621	.02126	16.44
60	64	74,619	1,718	.02302	15.79
61	65	72,901	1,817	.02493	15.15
62	66	71,084	1,919	.02700	14.52
63	67	69,165	2,022	.02923	13.91
64	68	67,143	2,124	.03164	13.32

Petitioner's Exhibit No. 6—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
65	69	65,019	2,227	.03425	12.74
66	70	62,792	2,328	.03707	12.17
67	71	60,464	2,426	.04012	11.62
68	72	58,038	2,519	.04341	11.08
69	73	55,519	2,608	.04697	10.56
70	74	52,911	2,688	.05081	10.06
71	75	50,223	2,760	.05495	9.57
72	76	47,463	2,821	.05943	9.10
73	77	44,642	2,868	.06425	8.64
74	78	41,774	2,901	.06945	8.20
75	79	38,873	2,918	.07506	7.78
76	80	35,955	2,916	.08109	7.37
77	81	33,039	2,894	.08759	6.97
78	82	30,145	2,851	.09458	6.60
79	83	27,294	2,787	.10210	6.23
80	84	24,507	2,700	.11018	5.88
81	85	21,807	2,592	.11886	5.55
82	86	19,215	2,463	.12817	5.23
83	87	16,752	2,314	.13814	4.93
84	88	14,438	2,149	.14883	4.64
85	89	12,289	1,970	.16027	4.36
86	90	10,319	1,780	.17249	4.10
87	91	8,539	1,584	.18553	3.85
88	92	6,955	1,387	.19944	3.61
89	93	5,568	1,193	.21425	3.39
90	94	4,375	1,006	.22999	3.18
91	95	3,369	831	.24669	2.97
92	96	2,538	671	.26439	2.79
93	97	1,867	529	.28310	2.61
94	98	1,338	405	.30285	2.44
95	99	933	302	.32364	2.28
96	100	631	218	.34548	2.13
97	101	413	152	.36835	2.00
98	102	261	102	.39225	1.87
99	103	159	66	.41712	1.75
100	104	93	41	.44294	1.63
101	105	52	24	.46963	1.52
102	106	28	14	.49712	1.39

Petitioner's Exhibit No. 6—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
103	107	14	7	.52613	1.29
104	108	7	4	.55409	1.07
105	109	3	2	.58331	.83
106	110	1	1	1.00000	.50

 PETITIONER'S EXHIBIT No. 7

1937 STANDARD ANNUITY TABLE

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
5	10	1,000,000	1,234	.001234	65.08
6	11	998,766	1,241	.001243	64.16
7	12	997,525	1,247	.001250	63.24
8	13	996,278	1,250	.001255	62.32
9	14	995,028	1,250	.001256	61.40
10	15	993,778	1,249	.001257	60.48
11	16	992,529	1,247	.001257	59.55
12	17	991,282	1,246	.001257	58.63
13	18	990,036	1,244	.001257	57.70
14	19	988,792	1,245	.001259	56.77
15	20	987,547	1,246	.001262	55.84
16	21	986,301	1,250	.001267	54.91
17	22	985,051	1,258	.001277	53.98
18	23	983,793	1,269	.001290	53.05
19	24	982,524	1,285	.001308	52.12
20	25	981,239	1,306	.001331	51.18
21	26	979,933	1,333	.001360	50.25
22	27	978,600	1,368	.001398	49.32
23	28	977,232	1,409	.001442	48.39
24	29	975,823	1,460	.001496	47.46
25	30	974,363	1,521	.001561	46.53
26	31	972,842	1,590	.001634	45.60
27	32	971,252	1,672	.001721	44.67
28	33	969,580	1,767	.001822	43.75

Petitioner's Exhibit No. 7—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
29	34	967,813	1,874	.001936	42.83
30	35	965,939	1,995	.002065	41.91
31	36	963,944	2,132	.002212	41.00
32	37	961,812	2,286	.002377	40.19
33	38	959,526	2,458	.002562	39.18
34	39	957,068	2,644	.002763	38.28
35	40	954,424	2,845	.002981	37.38
36	41	951,579	3,060	.003216	36.49
37	42	948,519	3,291	.003470	35.61
38	43	945,228	3,537	.003742	34.73
39	44	941,691	3,802	.004037	33.86
40	45	937,889	4,085	.004356	33.00
41	46	933,804	4,388	.004699	32.14
42	47	929,416	4,710	.005058	31.29
43	48	924,706	5,056	.005468	30.44
44	49	919,650	5,424	.005898	29.61
45	50	914,226	5,816	.006362	28.78
46	51	908,410	6,234	.006863	27.96
47	52	902,176	6,679	.007403	27.15
48	53	895,497	7,149	.007983	26.35
49	54	888,348	7,651	.008613	25.56
50	55	880,697	8,180	.009288	24.78
51	56	872,517	8,741	.010018	24.01
52	57	863,776	9,333	.010805	23.24
53	58	854,443	9,957	.011653	22.49
54	59	844,486	10,612	.012566	21.75
55	60	833,874	11,302	.013554	21.02
56	61	822,572	12,021	.014614	20.30
57	62	810,551	12,774	.015760	19.60
58	63	797,777	13,556	.016992	18.90
59	64	784,221	14,368	.018321	18.22
60	65	769,853	15,207	.019753	17.55
61	66	754,646	16,072	.021297	16.90
62	67	738,574	16,956	.022958	16.25
63	68	721,618	17,859	.024749	15.62
64	69	703,759	18,773	.026675	15.01
65	70	684,986	19,694	.028751	14.40

Petitioner's Exhibit No. 7—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
66	71	666,292	20,615	.030986	13.81
67	72	644,677	21,526	.033390	13.24
68	73	623,151	22,420	.035978	12.68
69	74	600,731	23,286	.038763	12.14
70	75	577,445	24,113	.041758	11.60
71	76	553,332	24,889	.044980	11.09
72	77	528,443	25,600	.048444	10.59
73	78	502,843	26,232	.052167	10.10
74	79	476,611	26,770	.056167	9.63
75	80	449,841	27,199	.060464	9.17
76	81	422,642	27,506	.065081	8.73
77	82	395,136	27,672	.070032	8.30
78	83	367,464	27,688	.075349	7.89
79	84	339,776	27,539	.081050	7.49
80	85	312,237	27,215	.087161	7.11
81	86	285,022	26,709	.093709	6.74
82	87	258,313	26,018	.100723	6.39
83	88	232,295	25,141	.108229	6.05
84	89	207,154	24,083	.116257	5.72
85	90	183,071	22,854	.124837	5.41
86	91	160,217	21,469	.134000	5.11
87	92	138,748	19,950	.143786	4.82
88	93	118,798	18,320	.154211	4.54
89	94	100,478	16,611	.165320	4.28
90	95	83,867	14,856	.177138	4.03
91	96	69,011	13,092	.189709	3.79
92	97	55,919	11,355	.203062	3.56
93	98	44,564	9,680	.217216	3.34
94	99	34,884	8,100	.232198	3.13
95	100	26,784	6,644	.248059	2.92
96	101	20,140	5,333	.264796	2.72
97	102	14,807	4,198	.283515	2.52
98	103	10,609	3,244	.305778	2.32
99	104	7,365	2,244	.331840	2.12
100	105	4,921	1,782	.362122	1.93
101	106	3,139	1,248	.397579	1.74
102	107	1,891	830	.438921	1.55

Petitioner's Exhibit No. 7—(Continued)

—Age—		Number Living	Number Dying	Yearly Probability of Dying	Complete Expectation of Life
Male	Female				
103	108	1,061	517	.487276	1.37
104	109	544	295	.542279	1.20
105	110	249	152	.610442	1.04
106	111	97	67	.690722	.88
107	112	30	24	.800000	.73
108	113	6	5	.833333	.67
109	114	1	1	1.000000	.50
110	115	0			

PETITIONER'S EXHIBIT No. 8

Complete Expectancies of Life Under Certain
Standard Mortality Tables, for Various Ages

Mortality Table	—Ages—			
	40	50	60	66
Combined Experience of Actuaries' ..	27.28	20.18	13.77	10.46
American Experience	28.18	20.91	14.10	10.54
ns. Com. 1941 Table.....				11.01
American Annuitants'	29.61	22.09	15.40	11.95
Combined Annuity—				
Male	31.10	22.91	15.79	12.17
Female	34.60	26.07	18.49	14.52
937 Standard Annuity—				
Male	33.00	24.78	17.55	13.81
Female	37.38	28.78	21.02	16.90

PETITIONER'S EXHIBIT No. 9

Present Values under Various Mortality Tables of an Annuity of \$1.00 per annum Payable for the Lifetime of an Annuitant age 66 at the Commencement of the Annuity, Assuming 4% Compound Interest.

(Discounting Future Payments Upon the Basis of Compound Interest at the Rate of 4% a Year.)

Mortality Table	Annual Payments, first payment at end of first year	Quarterly Payments, first payment at end of first quarter
Combined Experience		
or Actuaries	7.525	7.900
American Experience	7.616	7.991
American Annuitants'	8.387	8.762
Combined Annuity—		
Male	8.526	8.901
Female	9.815	10.190
1937 Standard Annuity—		
Male	9.411	9.786
Female	10.974	11.349

The actuarial factor for quarterly payments is .375. The values for quarterly payments have been obtained by adding this factor to the values for annual payments.

AS AND PREMIUMS PAYABLE
ONCE A YEAR. VALUES OF
SUBJECT TO PREMIUMS PAY-
ABLE ONCE A YEAR.

Terms payable fractionally through-
out the year, both annuities and
premiums, require the same treat-
ment as annuities payable
quarterly, but the modifications that must be
made in the formulas for the annuity and
premium are as follows:

If this annuity by $a_x^{(p)}$ we have

$$a_x^{(p)} = \frac{1}{p} \left[1 + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots \right]$$

$$a_x^{(p)} \approx \frac{1}{p} \left[1 + \frac{1}{p} \left(1 + \frac{1}{p} \right) \right]$$

$$a_x^{(p)} = \frac{1}{p} \left[1 + \frac{1}{p} \left(1 + \frac{1}{p} \right) \right] \dots$$

$$a_x^{(p)} = a_x + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots$$

$$a_x^{(p)} = a_x + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots$$

$$a_x^{(p)} = a_x + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots$$

$$a_x^{(p)} = a_x + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots$$

2. It will be seen from formula (2) that if the term n is not an integer, the value of $a_x^{(p)}$ is not the same as the value of a_x for the same term. In such cases, the value of $a_x^{(p)}$ is the value of a_x for the next integer term.

3. The corresponding value of the annuity-due payable at the end of each year is a_x . The corresponding value of the annuity-due payable at the end of each year is a_x .

$$a_x^{(p)} = a_x + \frac{1}{p} \left(1 + \frac{1}{p} \right) \left(1 + \frac{1}{p} \right) \dots$$



PETITIONER'S EXHIBIT No. 11

Present Values of Annuities Payable for the Lifetime of an Annuitant Age 66 at the Commencement of the Annuity, under Various Mortality Tables with 4% Compound Interest.

(Discounting Future Payments Upon the Basis of Compound Interest at the Rate of 4% a Year.)

Payments made annually, First Payment at the
End of First Year

Amount of Annuity.....	\$ 9,260.99	\$ 15,000.00
Mortality Table		
Combined Experience or Actuaries.....	69,688.95	112,875.00
American Experience	70,531.70	114,240.00
American Annuitants'	77,671.92	125,805.00
Combined Annuity—		
Male	78,959.20	127,890.00
Female	90,896.62	147,225.00
1937 Standard Annuity—		
Male	87,155.18	141,165.00
Female	101,630.10	164,610.00

Payments made quarterly, First Payment at the
End of First Quarter

Amount of Annuity	\$ 9,260.99	\$ 15,000.00
Mortality Table		
Combined Experience or Actuaries.....	73,161.82	118,500.00
American Experience	74,004.57	119,865.00
American Annuitants'	81,144.79	131,430.00
Combined Annuity—		
Male	82,432.07	133,515.00
Female	94,369.49	152,850.00
1937 Standard Annuity—		
Male	90,628.05	146,790.00
Female	105,102.98	170,235.00

[Endorsed]: No. 12228. United States Court of Appeals for the Ninth Circuit. Estate of Abraham Koshland, Deceased, Jesse Koshland, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed April 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 12,228

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF THE PORTIONS OF THE
RECORD TO BE PRINTED

Comes now the petitioner above named by its attorneys of record and designates the following portions of the record as the only portions material to the consideration of the petition for review and requests that only such designated portions be printed:

1. Docket entries. (Document No. 1.)

2. Pleadings:

(a) Amended petition. (Document No. 11.)

(b) Notice of deficiency attached to the original petition as Exhibit A and referred to in the amended petition. (Portion of Document No. 2.)

(c) Declaration of Trust dated December 26, 1922, attached to the original petition as Exhibit B and referred to in the amended petition. (Portion of Document No. 2.)

(d) Amended to said Declaration of Trust entitled "Memorandum of Declaration of Trust" dated December 26, 1923, attached to the original petition as Exhibit C and referred to in said amended petition. (Portion of Document No. 2.)

(e) Answer to amended petition. (Document No. 12.)

3. Stipulation of Facts filed with the Tax Court at the hearing on March 23, 1948, (Official Report of Proceedings at the Hearing, pp 17-18), except that there shall be excluded and not made a part of the printed record, the estate tax return, Exhibit A(1), of said Stipulation of Facts and the claim for refund, Exhibit D, of said Stipulation of Facts. (Portion of Document No. 9.)

4. Motion to Amend Record and Stipulation of Facts attached thereto filed with the Tax Court on May 5, 1948. (Document No. 15.)

5. Findings of fact and opinion of The Tax Court of the United States (11 Tax Court No. 109). (Document No. 22.)

6. Decision of The Tax Court of the United States. (Document No. 28.)

7. Petition for Review. (Document No. 29.)

8. Notice of Filing Petition for Review. (Document No. 31.)

9. Designation of Contents of Record on Review. (Document No. 32.)

10. Notice of Filing Designation of Contents of Record on Review. (Document No. 33.)

11. Statement of Points to be Relied on Upon Review. (Document No. 30.)

12. Notice of Filing Statement of Points to be Relied on Upon Review. (Document No. 34.)

13. The following exhibits introduced in evidence at the hearing before the Tax Court: (Portions of Document No. 10).

(a) Petitioner's Exhibit 3—Actuaries' or Combined Experience Table of Mortality.

(b) Petitioner's Exhibit 4—American Experience Table of Mortality.

(c) Petitioner's Exhibit 5—American Annuitants' Table, Ultimate Male.

(d) Petitioner's Exhibit 6—Combined Annuity Mortality Table.

(e) Petitioner's Exhibit 7—1937 Standard Annuity Mortality Table.

(f) Petitioner's Exhibit 8—Table entitled "Complete Expectancies of Life Under Certain Standard Mortality Tables, for Various Ages."

(g) Petitioner's Exhibit 9—Table entitled "Present Values Under Various Mortality Tables of an Annuity of \$1 per annum Payable for the Lifetime of an Annuitant Age 66 at the Commencement of the Annuity, Assuming 4% Compound Interest."

(h) Petitioner's Exhibit 10—Pages 128 and 129 of Life Contingencies by Spurgeon.

(i) Petitioner's Exhibit 11 — Table entitled "Present Values of Annuities Payable for the Lifetime of an Annuitant Age 66 of the Commencement of the Annuity, under Various Mortality Tables with 4% Compound Interest."

14. The following portions of the testimony offered at the hearing of the case before the Tax Court: (portions of Document No. 14).

(a) Commencing with the words "The Court" on page 2 of the Official Report of Proceedings and ending with "Mr. Hurley: A. J. Hurley for the Respondent. Ready, Your Honor," on said page.

(b) Commencing with the words "Lambert B. Coblentz called as a witness for and on behalf of the petitioner . . ." at the bottom of page 18 of the Official Report of Proceedings and ending with the following question and answer on page 21:

"Q. So far as you know, she is still in good health? A. As far as I know."

(c) Commencing on page 45 of the Official Report with the words "Mr. Taylor: It is hereby stipulated between counsel, subject to the objection by the Respondent . . ." and ending with the words "I think the objection is evident" on the first line of page 46, and then taking the following sentence on page 46, "The Court: The Respondent's objection is taken under advisement."

(d) Commencing on page 46 of the Official Report with the words "Mr. Taylor: Mr. Waites, will you take the stand, please" through the answer on

page 49 ending with the words "compound interest tables."

(e) Commencing on page 49 of the Official Report with the question by Mr. Taylor "Q: What does your work as a consulting actuary consist of" and going through the question and answer on page 88 "Q: So the correct value is actually \$170,236.95, the correct value of the life estate? A: Yes."

(f) Commencing at the top of page 90 of the Official Report with "Q: Now in some of the exhibits which have been introduced into evidence which you have prepared . . ." and continuing through the words on page 136 "Mr. Hurley: Respondent rests."

15. Certificate and Seal of the Clerk of The Tax Court of the United States. (Following Document No. 34.)

16. This Designation of the Portions of the Record to be Printed.

17. Notice of Filing of the Designation of the Portions of the Record to be Printed.

Dated May 10, 1949.

/s/ SAMUEL TAYLOR,

/s/ EDGAR SINTON,

Counsel for Petitioner.

[Endorsed]: Filed May 11, 1949. Paul P. O'Brien
Clerk.



No. 12,228

IN THE
United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Brief for Petitioner

SAMUEL TAYLOR,
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1211 Balfour Building
San Francisco 4, California
Counsel for Petitioner.



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Ballard v. United States (1946), 329 U.S. 187 at 193.....	
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Capitol-Barg Dry Cleaning Co. v. Com. (C.A. 6, 1942), 131 Fed.(2d) 712	
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Durkee v. Com. (C.A. 6, 1947), 162 Fed.(2d) 184.....	
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Transactions of the Actuarial Society of America (1930), Vol. 31	11

IN THE

United States
Court of Appeals

For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased, JESSE KOSHLAND, Executor,	}	<i>Petitioner,</i>

VS.

COMMISSIONER OF INTERNAL REVENUE,	}	<i>Respondent.</i>

Brief for Petitioner

OPINION BELOW

The only previous opinion is that of the Tax Court promulgated November 30, 1948 (R. 36-57) which is reported in 11 T.C. 904.

JURISDICTION

The petition for review (R. 58-61) involves a deficiency in federal estate tax determined by the Commissioner of Internal Revenue against the estate of the decedent, Abraham Koshland, who died on April 15, 1944. On April 7, 1947, the Commissioner mailed to the decedent's estate and to Jesse Koshland, the Executor, a notice of defi-

ciency in estate tax in the amount of \$49,062.25 (R. 11-14). Within ninety days thereafter and on May 5, 1947 (Doc. Entries R. 1) the petitioner filed a petition with The Tax Court of the United States for a re-determination of said deficiency under the provisions of Section 871(a) of the Internal Revenue Code. On March 23, 1948, an amended petition was filed (R. 4-10), and an answer thereto was filed by the respondent (R. 27-29). The decision of the Tax Court determining that there was a deficiency in estate tax in the amount of \$33,119.49 was entered on February 25, 1949 (R. 57-58). The proceeding is brought to this Court by the Petition for Review which was filed on March 21, 1949 (R. 58-61) under the provisions of the Internal Revenue Code sections 1141 and 1142.

STATEMENT OF THE CASE

On December 26, 1922, the decedent, Abraham Koshland, created a trust (R. 15-24) which he amended in ways not material to this petition for review by an amendment executed on December 26, 1923 (R. 25-27). The trust provided that its income should be paid to his wife, Estelle W. Koshland, for life "semiannually, quarterly or often" (R. 19) and provided for certain remainders due upon the death of the wife. Abraham Koshland died on April 15, 1944 (R. 38). At the time of his death he was 75 years and his wife was 66 years of age (R. 38). The Tax Court found that at the time of his death, as well as at the time of the Tax Court hearing (March 23, 1949) the decedent's wife was in good health and that her personal physician expected her to live out her normal life expectancy (R. 44).

Before the Tax Court, the petitioner and the respondent were in dispute as to whether the remainder interest in the trust as amended should be included in the gross estate. The Tax Court decided this issue for the respondent and petitioner has accepted its decision thereon. At the trial, petitioner and respondent were also in controversy as to whether the value of Estelle W. Koshland's life estate should be determined upon the basis of an annual income of \$15,000 as petitioner contended, or \$2,260.99 as respondent claimed in his notice of deficiency (R. 11-15). Respondent conceded in his brief that the value should be determined upon the basis of an annual income of \$15,000, and the Tax Court so found (R. 44) and determined the value of the life estate accordingly. The respondent conceded in his notice of deficiency (R. 11-15) that the value of the life estate of Estelle W. Koshland should be excluded from the gross estate. The issues remaining in controversy pertain to the manner of valuing said life estate. The respondent has valued it upon the basis of the Actuaries' or Combined Experience Mortality Table which was published in 1843 and which was based upon the experience of seventeen British life insurance companies over the period 1762 to 1837, and the general use of which was discontinued well prior to 1900 (R. 45, 78, Pet. Ex. 3, R. 148-150).*

*This table is sometimes referred to in the record as "Actuaries' or Combined Experience Table of Mortality" and sometimes as "Combined Experience Table of Mortality." The 1937 Standard Annuity Table of Mortality (Pet. Ex. 7, R. 158-161, 1890) is sometimes referred to as the "1937 Standard Annuity Table."

The Commissioner valued Mrs. Koshland's life estate in accordance with his regulations. Treasury Regulations 105, section 81.10(i)(3) provides:

"All other future payments [other than the value of an annuity contract issued by a company regularly engaged in the selling of such contracts] are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuarial or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday. Table A, a part of this section, gives factors applicable to a case in which only one life is involved. * * *"

Under Table A (see Appendix) the annuity or present value of \$1.00 due at the end of each year during the life of a person age 66, Mrs. Koshland's age at her husband's death, is \$7.52476.

Treasury Regulations 105, section 81.10(i)(6) provides:

"In the case of an annuity under which the decedent was entitled to receive during the life of another payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the figure in column 2 of Table A opposite the number of years in column 1 nearest the actual age of the person whose life measures the duration of the annuity, and then multiplying the product by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments."

Mrs. Koshland being entitled to payment of the income quarterly or more often," the Commissioner used the factor 1.01488 (Notice of Deficiency, R. 11-15 at 14).

The petitioner contended that the Actuaries' or Combined Experience Table of Mortality was obsolete and that the Commissioner used an erroneous quarterly factor. He further contended that the life estate should be valued upon the basis of the 1937 Standard Annuity Mortality Table (Pet. Ex. 7, R. 158-161, 88-90) and upon a quarterly factor of .375 to be added to the factor under said 1937 table for annual payments. The life estate so determined would have a value of \$170,236.95 (Pet. Ex. 11, R. 165, 105) and the remainder a value of \$61,287.69.*

The Commissioner valued the life estate on the basis of an annual income of \$9,260.99 and found a value of \$70,736.67 (Notice of Deficiency, R. 11-15 at 14). The Tax Court applied the Commissioner's Table A factor and the quarterly factor to an annual income of \$15,000 and found a value for the life estate of \$114,550.93. Subtracting this amount from \$231,524.64, the stipulated fair market value of the trust estate as of the date of the decedent's death (R. 45), the Court found a value for the remainder of \$116,973.71 (R. 47).

SPECIFICATION OF ERRORS RELIED UPON

1. The Tax Court erred in view of the uncontradicted evidence in failing to value the life estate of Estelle W. Koshland on the basis of the 1937 Standard Annuity Mortality Table.

*Petitioner's Exhibit 11 shows a value of \$170,235.00, but the correct value is \$170,236.95 as is explained on R. 105.

2. The Tax Court erred in view of the uncontradicted evidence in failing to find that the factor for quarterly payments to be used in the valuation of said life estate was .375 to be added to the factor for annual payments.

3. Assuming that the Tax Court did not err in failing to value said life estate upon the basis of said 1937 table, it erred in valuing said life estate upon the basis of the Actuaries' or Combined Experience Mortality Table. In view of the uncontradicted evidence, it erred in failing to find the respondent's use of said table to be arbitrary and invalid and in failing to place on the respondent the burden of proof with regard to the correct table.

4. Assuming that the Tax Court did not err in failing to use petitioner's quarterly factor in the valuation of said life estate, it erred in using the respondent's quarterly factor in said valuation. In view of the uncontradicted evidence, it erred in failing to find the use of respondent's factor to be arbitrary and invalid and in failing to place on the respondent the burden of proof with regard to the correct factor.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the Internal Revenue Code and of the regulations are set out in the Appendix infra. For the convenience of the Court, section 81.10(i) of Regulations 105, including Tables A and B, is quoted in full although the only pertinent portions are section 81.10(i) (3) and (6) and Table A. The section and both tables are set out in full in order that the applicable portions may be read in their context.

ARGUMENT

The Tax Court Erred in View of the Uncontradicted Evidence in Failing to Value the Life Estate of Estelle W. Koshland on the Basis of the 1937 Standard Annuity Mortality Table.

Though the Commissioner, in determining the value of the life estate on the basis of the Actuaries' or Combined Experience Mortality Table, acted in accordance with his regulations, the question of whether that mortality table or some other mortality table should be used is one to be decided on the evidence. The question of the proper mortality table to be used is one of fact. The incorporation of the Commissioner's table into his regulations does not give it binding force where the evidence shows that it is not applicable. That the question of the proper mortality table to use is one of fact is recognized by the Tax Court in its opinion in this case (R. 55-56).*

Though in view of the Tax Court's own treatment of the problem as one of evidence, it is hardly necessary to cite further cases to this effect, it may be pointed out that the cases are unanimous on the point. Thus in *Hanley, Administrator v. United States* (1945), 63 Fed. Supp. 73, the Court of Claims refused to follow Table A where the evidence did not support the 4 per cent interest factor which it used. It stated:

“We think the plaintiff is correct in saying that the use of this table is unauthorized and improper whenever its use produces a result substantially at variance with the facts. * * *

*The reference in the fifth line of page 55 of the Record to an “absolute” mortality table is a typographical error. The word should be “obsolete.”

“We do not think that article 44* directed the use of Table A in all cases, nor do we think it would have been valid if it had. It is only those Regulations of the Treasury Department which are reasonably adapted to the enforcement of an Act of Congress that have the force and effect of law. A regulation that produces a result different from that intended by Congress has no validity. *Helvering v. Sabine Transportation Company, Inc.*, 318 U.S. 306; *Helvering v. Credit Alliance Corporation*, 316 U.S. 107, 113.”

The *Hanley* case involved the interest factor in Table A rather than the mortality factor, but the principles are the same whether the interest factor or the mortality factor is involved. The 4 per cent interest factor is not in controversy in this case.

The Tax Court itself has refused to apply standard mortality tables where the evidence indicated that the person whose life expectancy was in question would not live as long a period as the life expectancy assumed for his age in such tables.

Estate of John Halliday Denbigh (1946) 7 T.C. 33;
Nellie H. Jennings Est. (1948) 10 T.C. 323.

We come now to a consideration of the evidence. On a question which is peculiarly a question for highly trained experts, the petitioner introduced the evidence of an experienced actuary whose qualifications were not called in question, and the respondent introduced no evidence wh-

*Article 44 of Regulations 80, 1937 edition, the estate tax regulations applicable in the *Hanley* case. Article 10(3) of Regulations 80, 1937 edition (which article incorporated Table A) is the same as section 81.10(i)(3) of Regulations 105, the applicable regulations in the instant case.

ever. It should be emphasized that all the evidence in this case is uncontradicted evidence, and that the respondent introduced no evidence at all.

Mr. Waites, the petitioner's actuary, is a consulting actuary who at the time of the trial had been engaged in his profession as an actuary for fifteen years (R. 73). He is associated with Coates and Herfurth, a firm of consulting actuaries of San Francisco and Los Angeles (R. 74). He is a fellow by examination of the Actuarial Society of America and of the American Institute of Actuaries (R. 73). In the United States, Canada, and Australia there are only between five hundred and six hundred actuaries who are fellows of these societies (R. 73-74). His work as a consulting actuary deals with the application of mortality tables to the valuation of life estates, and he is "intimately familiar with all the standard mortality tables" and knows their origin, background, validity and application (R. 75).

On the uncontradicted evidence in this case, it hardly seems necessary to stress the point that the Actuaries' or Combined Experience Table of Mortality is obsolete. The Tax Court found that this table, first published in 1843 (R. 78) "* * * is the result of experience of seventeen British life insurance companies covering a period from 1662 until 1837; it makes no distinction between the length of male lives and the length of female lives." (R. 45). It further found: "Modern experience has demonstrated that females live longer than males, and some annuity tables now do take this factor into account" (R. 46).

Mr. Waites testified as follows:

"Q. Is the Actuaries' or Combined Experience Table of Mortality generally regarded as obsolete among actuaries and among insurance companies?"

A. Yes. Its general use was discontinued by insurance companies and actuaries prior to 1900. About the only instances where it would be used now, apart from under the Regulations of the Bureau of Internal Revenue, are in some cases there may be policies that have been issued 40 or 50 years ago where it may be used for their valuation." (R. 9)

Mr. Waites testified that the Actuaries' or Combined Experience Table was obsolete because the expectancy of life had increased substantially since its publication (R. 77-78, 116).

The Tax Court (then the Board of Tax Appeals) itself held in *Anna L. Raymond* (1939) 40 B.T.A. 244, aff'd on another point (C.A. 7, 1940) 114 Fed. (2d) 140, cert. den. 311 U.S. 710:

"* * * That table [Table A] is shown to be outmoded. It adopts the so-called 'Actuaries' or Combined Experience Table of Mortality,' a table prepared in Great Britain in 1843 from experience data which have long since been regarded in this country as obsolete."

So much for the Actuaries' or Combined Experience Table. Mr. Waites testified to and there were introduced into evidence four other mortality tables (R. 80-91, P. Exs. 4-7, R. 150-161). These were the American Experience Table of Mortality (Pet. Ex. 4, R. 150-152), which first appeared in 1868 (R. 80), the American Annuitants Mortality Table (Pet. Ex. 5, R. 153-155), which was pu-

shed in 1920,* the Combined Annuity Mortality Table (Pet. Ex. 6, R. 155-158), which was published in 1928,† and the 1937 Standard Annuity Mortality Table (Pet. Ex. R. 158-161).

The research leading to the publication of the American Annuity Mortality Table “* * * brought to light that females were living for a much longer time than males” (R. 81), and separate American Annuity tables were issued for males and for females (R. 82). In connection with the Combined Annuity Mortality Table:

“It was brought out again that females were living longer than males. However, it was found that the one table could be used for both male and female lives. In fact, the male table could be used provided the females were taken at an age four years younger than the male lives. Accordingly, the one table is used for the two.” (R. 84.)

With regard to the 1937 Standard Annuity Mortality Table, Mr. Waites testified:

“Again, in this table they found that females were living longer than males. However, they did find that the one table again would do for both male and female lives, provided, however, that the age of the female was taken at an age five years younger than the male life. So the one table does for both male and female lives with the proper adjustment.” (R. 90.)

*Vol. 21, *Transactions of the Actuarial Society of America* (1920).

†Vol. 29, *Transactions of the Actuarial Society of America* (1928), p. 123. This table was called the “Group Annuity Table” when published in 1928 and was republished in 1930 in Vol. 31 of the *Transactions* under its present name of “Combined Annuity Mortality Table.”

Mr. Waites testified with regard to the tables introduced into evidence:

“Q. Now, you have referred to certain mortality tables and have given their history and their background. Why have you selected these tables?

A. I have selected these tables because all of them were standard mortality tables as of the time that they were developed, and they have been in current use from time to time, and I have used them to illustrate the fact that the expectancy of life has been continually increasing.

Q. They are tables which, as of the time they were prepared, were in widespread use?

A. At the time they were prepared, or following the time they were prepared they were in widespread use.” (R. 93-94.)

Mr. Waites testified that as modern tables were developed showing increased life expectancies, the older ones became obsolete (R. 80, 82, 84). Petitioner's Exhibit 8 (R. 161) shows the expectancies of life under the various mortality tables referred to. It shows that the life expectancy of a woman age 66, Mrs. Koshland's age at the time of the death of her husband, was 10.46 years under the Actuaries' or Combined Experience Table, whereas under the 1937 Standard Annuity Table, it was 16.90 years.

As the expectancy of life increased and was reflected in more modern tables, there was also, of course, an automatic increase in the annuity factor or present value of \$1.00 per year payable for the lifetime of an annuitant (R. 147). Thus, the annuity factor for Mrs. Koshland (without regard to the quarterly factor) was 7.525 under the Actuaries' or Combined Experience Table and 10.94

nder the 1937 Standard Annuity Table (Pet. Ex. 9, R. 32).

Mr. Waites testified with regard to the 1937 Standard Annuity Mortality Table:

“This mortality table they developed coincided with an annuity mortality investigation that they were running at the same time covering the period 1931 to 1935, I think. As a result, this table was adopted by insurance companies and actuaries and called the 1937 standard annuity table. This table has been used since 1937 and it is still used by actuaries and insurance companies as a basis for determining annuities, reserves and expectancies thereon.

However, insurance company actuaries are of the opinion that it isn't sufficiently conservative. That is their experience is that people are living longer than the expectation indicated by this table.

Q. When you say 'conservative' you mean—

A. From their point of view.

Q. The longevity shown by the table is less than the longevity shown by actual experience?

A. That is correct.

Q. Now you have referred here to the use of the 1937 Standard Annuity Table by insurance companies. Does that include use by leading insurance companies like Metropolitan Life Insurance Company and New York Life Insurance Company?

A. Oh, very definitely.

Q. And other leading companies?

A. Very definitely. All the insurance companies are using it.

Q. And were using it as of April 15, 1944?

A. Oh, yes.” (R. 89.)

He further testified:

“Q. * * * It has been stipulated in this case that Abraham Koshland died on April 15, 1944, at the age of 75, and that Estelle W. Koshland, his widow, was 66 years of age at the time of his death.

It has been further stipulated that the fair market value of the trust estate as of the date of Abraham's death was \$231,524.64.

In your opinion, upon the basis of what mortality tables should the life estate of Mrs. Estelle W. Koshland be valued?

A. I would use the 1937 Standard Annuity Mortality Table.

Q. You are aware, of course, and were aware in answering that question that Mrs. Estelle W. Koshland has a life estate under the trust, Exhibit B as amended by Exhibit C?

A. Yes, I understand that.

Q. Now, why would you use the 1937 Standard Annuity Mortality Table, and I take you would use the one for females?

A. Yes, I would use the one for female lives. I would use it because that is the most current standard table that would reflect the expectancy of a person at this time.

Q. Was that true as of April 15, 1944?

A. That would be true as of 1944 as well.

Q. It would be true from 1937 to date?

A. Yes.

Q. Is it the table which insurance companies have found reflects most accurately the actual mortality of annuitants?*

A. That has been their experience.

*Mr. Waites testified that he used the terms “life annuity” and “life estate” interchangeably (R. 105-106, 127-128, 146).

Q. Is the 1937 Standard Annuity Table in a widespread use?

A. Oh, yes, it is used by every insurance company and every actuary for that matter.

Q. That is true as of April 15, 1944?

A. Yes." (R. 101-102.)

Thus the record contains uncontradicted testimony that the 1937 Standard Annuity Mortality Table is used by every actuary in valuing life estates, and that it is the table to use in valuing Mrs. Koshland's life estate because "is the most current standard table that would reflect the expectancy" of a person at the time of Mr. Koshland's death.

As the cases cited below indicate, the Court erred in refusing to follow this testimony. It might be pointed out that the Court erred in its finding with regard thereto. It found (R. 46):

"The 1937 Standard Annuity Table has been used by insurance companies and by actuaries as a basis for determining annuities and life estates since 1937. The table is used for both male and female lives, except that the age of the female is taken at an age five years younger than the male life. It is one of the most current tables in use for the evaluation of annuities."

Mr. Waites' uncontradicted testimony was not that the 1937 Standard Annuity Mortality Table was "one of the most current tables" but "*the* most current standard table."

The Tax Court decided the case on the ground that the petitioner, despite the uncontradicted testimony of its expert, had not met its burden of proof.

The rationale of the Court's decision is found in the following paragraphs from its opinion:

"The table petitioner urges might be worthy further consideration if our question were the cost of an annuity from a commercial insurance company. This was the underlying problem posed in the Raymond case, and it was there considered proper to utilize a table that such companies were using in their annuity business. We observed in the Bartman case, *supra*:

"* * * that insurance companies take into consideration the element of self selection in writing annuities; and that they use whatever tables are best suited for their particular needs. * * *"

There is no showing here that the mortality of inheritors or donees closely resembles that of purchasers of annuity policies. In fact, contrary evidence appears in the record.

Whatever may be the shortcomings of the table used by respondent, cf. concurring opinion of Mello, Jr., in *Henry F. Du Pont*, *supra*, petitioner has not convinced us that the 1937 table or any other table not embodied in respondent's regulations, must be applied in this proceeding, or that respondent's use of the Combined Experience Table in this proceeding is erroneous. * * *" (R. 56.)

The Court's reasoning is not only in conflict with the uncontradicted evidence but it is in conflict with its own findings of fact and with the Treasury Regulations.

The Tax Court found: "The 1937 Standard Annuity Table has been used * * * by actuaries as a basis for determining * * * life estates since 1937." The Court specifically finds that the table is in use by actuaries for determining life estates (as well as by insurance companies)

etermining annuities), yet it states that it is to be considered if at all only where the question is the cost of an annuity from a commercial insurance company. The conflict between its finding and its reasoning is obvious.

In fact, were the question the cost of an annuity from a commercial insurance company, then under the Treasury regulations, neither the Actuaries' or Combined Experience Table of Mortality nor the 1937 Standard Annuity Mortality Table could be used. Regulations 105, section 1.10(i)(2) specifically states:

“The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.”

In the words of the regulations (Reg. 105, sec. 81.10(i)(3)) it is only all future payments other than the value of annuity contracts issued by commercial insurance companies that are to be determined upon the basis of a mortality table.

It is true that the 1937 table is used by insurance companies. In fact, it is used by all the insurance companies (R. 89). The Actuaries' or Combined Experience Table as in its day also used by insurance companies. It was based on the experience of seventeen British life insurance companies covering the period from 1762 until 1837 (R. 5). The vice in that table is not that insurance companies have used it but that it became so outdated that they abandoned its use well prior to 1900 (R. 78). “A showing that the [mortality] tables are used by reputable life insurance companies is sufficient to establish their status as standard authority.” 32 Corpus Juris Secundum 629, 630.

The uncontradicted testimony indicates that when insurance companies use the 1937 table as a basis for determining annuities, they rate it down at least one year and most of them rate it down two years because their experience indicates that people are living longer than the expectation indicated by the table (R. 89, 123). Thus, "if the individual's age is 64, they take the value shown as age 62" (R. 123). In addition, the insurance companies "load" or add other amounts to provide for contingencies (R. 132-133).

The record contains a stipulation of the parties which the Court completely ignored in its opinion which shows that the cost of an annuity policy from a commercial insurance company would have been much more than the value determined for Mrs. Koshland's life estate under the 1937 Standard Annuity Table.

"Mr. Taylor: It is hereby stipulated between counsel, subject to the objection by the Respondent on the ground that said facts are immaterial, that the cost as of April 15, 1944, of a non-refund single premium life annuity for a female age 66 purchased from a standard legal reserve life insurance company regularly engaged in the selling of annuity contracts would have been at least \$219,000 for an annuity paying said person \$15,000 a year * * *.

It is further stipulated that by a non-refund annuity is meant an annuity which pays the annuitant the stipulated sum for his life, but the payments under which terminate upon the death of the annuitant.

May it be so stipulated, counsel?

Mr. Hurley: Yes, * * *." (R. 71-72.)

The value of Mrs. Koshland's life estate upon the basis of the 1937 table, even taking the quarterly factor into

account, is \$170,236.95 (R. 105). In other words, the cost from a commercial insurance company would have been approximately \$49,000 in excess of the value set on the life estate under the 1937 table.

The opinion of the Court states: "There is no showing here that the mortality of inheritors or donees closely resembles that of purchasers of annuity policies. In fact, contrary evidence appears in the record" (R. 56).

As above pointed out, these statements are in direct conflict with the Court's finding that the 1937 table has been used by actuaries as a basis for determining life states since 1937 (R. 46) and the uncontradicted testimony of petitioner's expert that the 1937 table is the most current standard table that would reflect the life expectancy of a person at the date of Mr. Koshland's death in 1944 and at the date of the trial in 1948 (R. 101-102). The statement of the Court that evidence appears in the record that the mortality of inheritors or donees does not resemble that of purchasers of annuity policies is completely without foundation. What the uncontradicted evidence shows is that because of the increase in longevity even since the issuance of the 1937 table, that table is not conservative enough to suit the insurance companies and that they have rated it down at least one year and usually two, and in addition, they load their annuity rates. This accounts for the \$49,000 difference in cost between the value of Mrs. Koshland's life estate on the basis of the 1937 table and the cost of an annuity for her.

One further finding of the Tax Court which is in direct conflict with the uncontradicted evidence and which seems to have influenced its decision should be noted.

The Court found that the Insurance Commissioner's 1941 Standard Ordinary Table of Mortality is "considered as reflecting general mortality experience" (146).

Mr. Waites testified as follows:

"A. * * * Now, I think it is only right that I should explain something about the Commissioner's 1941 Standard Ordinary Table to which you have referred.

Now, that table was based on another table called Table 'Z.' Table 'Z' was based on the mortality of life insurance companies for, I think it was from 1910 to 1934, something like that, and this Table 'Z' corresponded to a basic table.

Now, that gave just about the actual mortality that the insurance companies were experiencing. However, the insurance companies said, 'Oh, no, this won't do, because there is no leeway for us there. We want something that will give us greater mortality. At least we want a table that will give greater mortality than that shown by Table "Z."'

For this purpose the Commissioners' 1941 Standard Ordinary table was developed, and with that as a background and remembering that it is a loaded table for life insurance purposes, the expectancy is 11.01 years." (R. 121).

He further testified:

"Q. Your testimony is they [the insurance companies] make up their own tables. Is that right?

A. That's right, or use the tables that approximate their actual experience.

The Court: And such a table not only reflects their actual experience so far as the life of insureds are concerned but it is also considerably loaded.

The Witness: Very definitely, because they want to set something aside for epidemics and things of that nature." (R. 124-125).

He further testified:

"Q. Now, I asked you, Mr. Waites, why you used this 1937 Standard Annuity Mortality Table in your consideration of this case. You were familiar, of course, with the 1941 Commissioners' Table?

A. Oh, yes.

Q. Will you indicate why you did not use that?

A. The reason I did not use the Commissioners' 1941 Standard Ordinary Table is that it is loaded. By 'loaded,' it assumes that there is going to be—well, a shorter life expectancy at each age. It is deliberately created that way because it is used for life insurance.

* * * * *

Q. Did you consider the Commissioners' 1941 Table as a table based on the desire of insurance companies in life insurance matters to have an extra margin of safety rather than a table based on actual experience in connection with mortality?

* * * * *

A. That is correct. In other words, I think I can clarify it a little. I will repeat what I said before.

The reason I did not use the Commissioners' 1941 Standard Ordinary Table is because it does not reflect current mortality inasmuch as it has a loading in it to provide for the hazard of greater number of deaths that might be indicated.

By Mr. Taylor:

Q. To take care of events such as epidemics, is that your point?

A. Yes, epidemics, accidents and catastrophe things of that nature.

Q. Yes. Your failure to use that table was not an oversight then?

A. Oh, no. I deliberately avoided using it for that reason.

Q. Because you didn't think it applicable?

A. No, no. It's not applicable under any circumstances, I wouldn't think.

Q. Now Mr. Hurley questioned you as to whether the 1937 Standard Annuity Table might not be what you call 'loaded' in favor of longer life for annuitants. Isn't it a fact, or is it a fact that actual experience since 1937 indicates that the longevity rate among all classes is in excess of that, and among all ages is in excess of that set forth in the 1937 Table for Expectancy of Life?

A. Yes. People are living longer than that indicated under that table.

Q. So that table, if anything, is not loaded enough is it, in favor of longevity?

A. Not for annuitants.

Q. And hence the insurance companies in the selling of annuities use that table but treat the applicant as having a lesser age than they actually have, determining the rates?

A. And in addition to that—

Q. Is that correct?

A. That is correct. And in addition, they add other amounts to it to provide for any other contingencies that might arise.

Q. In other words, the loading is not in the table but the loading is in addition to the table?

A. That is correct." (R. 131-133.)

He further testified:

“Q. Mr. Waites, the 1941 Commissioners’ Table is not used in determining the value of life estates or annuities?

A. I have never known it to be used. I have never used it myself.

Q. The answer is ‘No,’ is it?

A. ‘No.’

* * * * *

Q. The 1941 Commissioners’ Table is loaded by the insurance companies because they want larger reserves as a matter of safety?

A. Yes.

Q. And the 1937 Standard Annuity Table, the experience, actual life experience under that, has been that longevity is in excess of that estimated under that table?

A. That is true, for annuitants.

* * * * *

Q. So there is no loading under the 1937 Standard Annuity Table?

A. Oh, no. The 1937 Standard Annuity Table doesn’t have any loading in it at all.” (R.144-145.)

In view of the uncontradicted testimony, it is obvious that the Court’s finding that the 1941 Table is “considered as reflecting general mortality experience” is erroneous. The uncontradicted evidence is that the table which reflects general mortality experience and which actuaries and life insurance companies use to value life estates and annuities is the 1937 table.*

*Even the 1937 table is too conservative but respondent cannot complain of petitioner’s failure to rate down Mrs. Koshland’s age since the effect would be to increase the value of the life estate.

To sum up: Petitioner has offered uncontradicted expert evidence to the effect that the Actuaries' or Combined Experience Mortality Table is obsolete and that the 1937 Standard Annuity Mortality Table was, as of the date of death and as of the date of trial, the most current and accurate table on which to determine the value of Mrs. Koshland's life estate. The respondent has offered no evidence whatsoever. The cases indicate that on such a record, the Tax Court should have found in accordance with the evidence offered by the petitioner and that it will be reversed for its failure so to do and directed to enter a decision for the petitioner.

In *Belridge Oil Company v. Commissioner* (C.A. 1936) 85 Fed.(2d) 762, this Court reversed the Board for ignoring expert testimony. It stated:

"The Board not only disregarded the opinion testimony of the experts, but it ignored factual evidence as well. No evidence whatever was offered for respondent, and the findings are against all the positive and affirmative evidence and are not supported by the record.

* * * * *

It is contended that the Board is not required to follow the testimony of experts, but may disregard their evidence entirely. This statement is too broad to be correct. In *Boggs & Buhl v. Commissioner* (C.C.A. 3), 34 F.(2d) 859, the court, at page 86 said:

"* * * While the Board may, as a general principle, reject expert testimony and reach a conclusion in accordance with its own knowledge, experience, and judgment, yet it must have knowledge of and experience with the particular subject under con-

sideration. There is no evidence that the Board had any independent and personal knowledge whatever of the business, reputation, and good will of the petitioner. Therefore, it could not set aside or disregard all the positive and affirmative evidence as to the value of the good will, and base its conclusion upon conjecture.'

To the same effect are *Pittsburgh Hotels Co. v. Commissioner*, 43 F.(2d) 345; *Nichols v. Commissioner*, 44 F.(2d) 157; *Bonwit Teller & Co. v. Commissioner*, 53 F.(2d) 381.

The case of *Uncasville Mfg. Co. v. Commissioner*, 55 F.(2d) 893 cited for respondent, does not contravene this doctrine.

While the Board may reject expert testimony and reach a different conclusion, to justify it in so doing, as pointed out by the authorities, it must itself have knowledge of the subject-matter and experience with it. There is no evidence whatever in this record to indicate that the Board has any independent knowledge of the particular facts in this case. Indeed, the Board specifically disclaimed this essential when it said in its opinion 'nor have we substituted our own "knowledge, experience and judgment" for the opinions of these experts.' Since no evidence whatever was submitted for respondent, it was error wholly to ignore this testimony.

The presumption of correctness of the determination of the Commissioner was thus overcome by positive and affirmative testimony for the petitioner, which stands unimpeached. The Board's finding of value is therefore contrary to all the testimony."

In *Citrus Soap Company of California v. Lucas* (C.A., 1930), 42 Fed.(2d) 372, this Court in reversing the

Board of Tax Appeals for refusing to follow expert testimony on value stated:

“* * * The foregoing testimony was competent and from a competent source. It was not contradicted by any other testimony. It was not unreasonable or improbable in itself, and, in our opinion, it tended to prove as a matter of law that the good will acquired by the petitioner from its predecessor in interest had a substantial value.”

This Court has as recently as February 1949 stated in the case of *Grace Bros. Inc. v. Commissioner of Internal Revenue* (C.A. 9, 1949), 173 Fed.(2d) 170:

“It is axiomatic that uncontradicted testimony must be followed. (*Chesapeake and Ohio Ry. v. Martin*, 1931, 283 U.S. 209, 216-217; *San Francisco Association for the Blind v. Industrial Aid*, 8 Cir., 1947, 152 Fed.(2d) 532, 536; *Foran v. Commissioner*, 5 Cir. 1948, 165 Fed.(2d) 705.) The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or in the case of testimony which is inherently improbable.”

The rule in this Circuit has been followed also by other Circuit Courts. In *Nachod and United States Signal Corp. v. Commissioner* (C.A. 6, 1934), 74 Fed.(2d) 164, (an income tax case involving valuation of patents), the Court said:

“* * * While the Board as a general principle of law may reject expert testimony and reach a conclusion in accordance with its own knowledge, experience and judgment, it must itself have knowledge of the subject matter and experience with it. *Pitt*

burgh Hotels Co. v. Commissioner of Internal Revenue, 43 Fed.(2d) 345 (C.C.A. 3). It cannot arbitrarily disregard all affirmative and positive testimony applicable to value in a particular case. Nor can it rely wholly upon the presumption of correctness that attaches to the findings of the Commissioner. As we said in *Rookwood Pottery Co. v. Commissioner*, 45 Fed.(2d) 43, 'We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value, and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him, and it was we think the duty of the Board to take the same view.' Cf. *Lunsford v. Commissioner*, 62 Fed.(2d) 740 (C.C.A. 6); *Planters Operating Co. v. Commissioner*, 55 Fed.(2d) 583, 585 (C.C.A. 8)."

In the recent case of *Roth Office Equipment Co. v. Gallagher* (C.A. 6, 1949), 172 Fed.(2d) 452, the Court of Appeals for the Sixth Circuit in reversing the District Court stated:

"We are of the opinion that the findings of the District Court on the issue of the reasonableness of the compensation for 1942 were clearly erroneous and should be set aside. There was little, if any, dispute in the evidence. The appellee offered no witnesses in support of his position. No witness testified that the amounts found by the District Court as reasonable compensation in 1942 was the reasonable compensation to which the officers were entitled. The only direct evidence before the Court on the specific question of reasonableness of compensation was the testimony of Harold Hampton and Archie Shearer,

both well-qualified, impartial witnesses, with many years of experience. They testified that in their opinion the compensation was reasonable, with Mr. Hampton referring to it as 'very reasonable.' The credibility of these witnesses was not put in issue. The appellee offered no witness to contradict this testimony or to testify in any way that the compensation was unreasonable to any extent. On this crucial and single issue of fact in this case this unimpeached uncontradicted testimony from well-qualified, impartial witnesses can not be disregarded by the Court. This Court has several times stated that such testimony should be accepted by the fact-finder in a matter in which the fact-finder has no knowledge or experience upon which he could exercise an independent judgment. *Capitol-Barg Dry Cleaning Co. v. Commissioner*, 131 Fed.(2) 712, 715; *Toledo Grain & Milling Co. v. Commissioner*, 62 Fed. (2) 171, 173; See *Lawton v. Commissioner*, 164 Fed. (2) 380, 384; *Weizer v. Commissioner*, 165 Fed.(2) 772, 775. As was pointed out in *T. P. Taylor & Co. v. Glenn*, 6 Fed. Supp. 495, 499, W.D. Ky., if the compensation paid is unreasonable the appellee certainly could have produced some experienced witness from the industry who would have said so, and the failure to offer such a witness on the crucial issue in the case operates very strongly against his contention. The burden of proof in cases of this kind is upon the taxpayer but we are of the opinion that that burden has been met when the taxpayer introduces uncontradicted, unimpeached testimony from well-qualified, impartial witnesses sustaining its contention, unless the established facts themselves are such as to show that such testimony ought not to be accepted. *Heywood Boot & Shoe Co. v. Commissioner*, 76 Fed.(2) 586, C.C.A. 1st."

There are numerous other cases in accord:

Bonwit Teller & Co. v. Com. (C.A. 2, 1931), 53 Fed. (2d) 381, cert. den. 284 U.S. 690;

Capitol-Barg Dry Cleaning Co. v. Com. (C.A. 6, 1942), 131 Fed.(2d) 712;

Blackmer v. Com. (C.A. 2, 1934), 70 Fed.(2d) 255;

Farmer et al., Trustees v. Com. (C.A. 10, 1942), 126 Fed.(2d) 542;

Russell et al. v. Com. (C.A. 1, 1930), 45 Fed.(2d) 100.

It needed hardly be said that actuarial science is not a matter which the Tax Court has knowledge of or experience with.

In the instant case there was uncontradicted testimony that Mrs. Koshland's life estate should be valued upon the basis of the 1937 Standard Annuity Mortality Table. There was no testimony of any sort on the part of the respondent. The question is obviously one peculiarly in the knowledge of actuarial experts. That uncontradicted expert testimony on a very technical matter should, as the above cases show, have been followed.

2. The Tax Court Erred in View of the Uncontradicted Evidence in Failing to Find That the Factor for Quarterly Payments to Be Used in the Valuation of Mrs. Koshland's Life Estate Was .375 to Be Added to the Factor for Annual Payments.

The trust provided that its income should be paid to Mrs. Koshland "semiannually, quarterly, or oftener for and during her lifetime" (R. 19). A life estate where the life tenant is to be paid more frequently than annually has a higher value than one where the payments are an-

nual since the life tenant in the former case need not wait as long for his money as in the latter.

The Commissioner's regulations recognize this. Regulations 105, section 81.10(i)(6) provides:

"In the case of an annuity under which the decedent was entitled to receive during the life of another payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the figure in column 2 of Table A opposite the number of years in column 1 nearest the actual age of the person whose life measures the duration of the annuity, and then multiplying the product by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments." (See Appendix.)

The Commissioner in his notice of deficiency (R. 14) used the quarterly factor set forth in his regulations.

The petitioner offered uncontradicted, expert testimony that the Commissioner's factor was erroneous and that the correct factor was .375 added to the factor for annual payments. The respondent offered no evidence at all.

The Court's findings state its conclusion that the proper factor for quarterly payments is the Commissioner's factor without any indication of the basis for such conclusion (R. 46-47).*

In its opinion, the Court dismissed the quarterly factor issue with the following statement:

"Even greater weakness pervades petitioner's argument as to the proper factor for quarterly pay

*The finding refers to annual payments to "Estate of Kosland" under the trust. This is an obvious error as the reference plainly should be to Estelle W. Koshland.

ments. The actuarial expert testified that the factor respondent used was proper if only an annuity for a term certain were involved, but was not correct if the annuity were for life. He testified further that the value of a life annuity, payable quarterly, is less than the value of an annuity certain, payable quarterly, for a term equal to the annuitant's life expectancy. Yet the factor petitioner urges and the method of its application lead to a higher value for a life annuity. This discrepancy could not be adequately explained by petitioner, nor was there any significant evidence as to the derivation of the factor it sought to have us apply. Petitioner's view cannot be sustained. *Estelle May Affelder, supra.*" (R. 56-57.)

The Court's conclusion on the quarterly factor issue is not only in conflict with the uncontradicted expert testimony, but it can be demonstrated from the record to be mathematically erroneous.* With all due respect to the Tax Court, its decision on the quarterly factor is amazing and highlights its error in ignoring the evidence not only

*It may be of interest to indicate the differences in value resulting from the use of the two factors. The value of the life estate under the 1937 Standard Annuity Mortality Table, if the petitioner's quarterly factor is used, is \$170,236.95 (R. 105) and, the Commissioner's quarterly factor is used is \$167,061.45 10.97413 [factor for annual payments, R. 96] $\times 1.01488 \times$ (\$15,000). Thus, the use of the petitioner's factor increases the life estate by \$3,175.50. The value of the life estate under the Actuaries' or Combined Experience Table of Mortality, if the petitioner's quarterly factor is used, is \$118,496.40 $(7.52476$ [factor for annual payments per Table A (see Appendix)] $+ .375 \times$ \$15,000) and if the respondent's quarterly factor is used is \$114,550.95 $(7.52476$ [factor for annual payments] $\times 1.01488 \times$ \$15,000). Thus the use of the petitioner's factor increases the life estate by \$3,945.45. The figures in this footnote vary slightly from those in Petitioner's Exhibit 11 (R. 165) because the factors there used were carried out to three decimal places whereas in this footnote the factors used are carried out to five decimal places.

on this point but also on the main point of which mortality table to use.

The pertinent evidence is as follows:

“Q. How do you know, Mr. Waites, that when the Commissioner uses the factor for quarterly payment 1.01488 that he takes what you called the interest only into account and not the element of mortality?”

A. Well, I think I can best answer that by referring to a book of interest tables. I have it here. This book is Glover, Part 1, ‘Tables of Applied Mathematics in Finance, Insurance Statistics,’ edited by James W. Glover, Ph.D., Professor of Mathematics and Insurance, University of Michigan, ‘Compound Interest Functions and Logarithms of Compound Interest Functions’ and so on, here, published by Ann Arbor, Michigan, George Wahr, Publisher, 1930.

Q. Is that a standard book used by actuaries?

A. This is a standard book used by actuaries and accountants. Part 1 refers to compound interest functions only, and on page 6 of Part 1 under 4 per cent and for the factor relating to quarterly payment there is the factor 1.01487744.

Now, if that were taken to the nearest place to coincide with the Commissioner’s value, that would be 1.01488.

And in a similar manner, I haven’t checked up on the semiannual payments and the annual—are there monthly payments there?

Mr. Hurley: Yes, monthly.

The Witness: For semiannual payments it gives factor 1.009902, and I think that coincides with the value of the Commissioner’s schedule.

By Mr. Taylor:

Q. The Regulations show for semiannual payments the factor 1.00990. So that checks with Mr. Glover.” (R. 126-127.)

“Q. Now, I note that you use in Petitioner’s Exhibit 9 .375 as the actuarial factor for quarterly payments. The Commissioner in his regulations, Section 81.10(i), Regulations 105, uses as the factor for quarterly payments the number 1.01488.

Will you explain why your figure is different from the Commissioner’s figure?

A. The Commissioner’s figure is the correct figure to use if you are dealing with an annuity that involves interest only. However, when you are dealing with an annuity that involves interest and in addition the probability of living or dying, then the correct actuarial factor is .375.

For example, now, if you had an annuity payable for 10 years certain in any event, whether or not the individual lived or died, then the use of the factor that the Commissioner used would be correct. However, if you had the same annuity that was payable only in the event that the person survived, then it would be necessary to use a factor such as I have used.

In other words, the factor of .375 that I have used recognizes that interest as well as mortality have been taken into consideration in determining the value of quarterly payments from the value of annual payments.

Q. You said interest as well as mortality. You mean mortality as well as interest? A. Yes.

Q. I mean, the Commissioner recognizes interest but he doesn’t recognize mortality in his factor. Is that correct?

A. That’s right. The factor he uses is only an interest factor, whereas the factor of .375 involves interest and mortality.

Q. And the life estate here involves both interest and mortality? A. Yes, it does.

Q. Since it ends upon the death of Mrs. Koshland

A. Yes, it does.

Q. And the Commissioner in his factor took no recognition of the mortality aspect?

A. As far as the factor is concerned.

Q. As far as the factor for quarterly payments is concerned?

A. He has just recognized the interest element.

Q. Yes. Now, the factor which you used for quarterly payments, .375, was that used in accordance with established actuarial principles?

A. It was. That is the factor that is used by actuaries in determining quarterly payments from the value of annual payments.

Q. Now, you are testifying in effect that the Commissioner is in error actuarially speaking in the use of his quarterly factor?

A. That is correct.

Q. In view of the fact that you are attacking the regulations broadside here, so to speak, will you indicate to the Court the authority for your conclusion?

A. Yes. The derivation of the factor of .375 is worked out in standard actuarial textbooks, and for this purpose I would like to refer you to what is known as the Actuaries' Bible. That is Spurgeon's 'Life Contingencies.'

Q. Will you indicate who published it, where it was published for the record, and also the exact name of the author?

A. This text—the author is E. F. Spurgeon, 'Life Contingencies,' Cambridge, published for the Institute of Actuaries at the University Press, 1929.

Q. That is the University at Cambridge in England?

A. That's right, and the derivation of this value appears on Page 129 under Section 2 of Chapter VI.

Q. It shows on Pages 128 and 129 that this formula which reaches the result .375 is derived by complex—at least complex to a lawyer—mathematical computations. A. That's right." (R. 97-99.)

The pertinent pages, 128 and 129, of "Life Contingencies" by Spurgeon are in evidence as Petitioner's Exhibit 10 (R. 100, 163).

This exhibit shows mathematically how the proper quarterly factor is arrived at. After setting forth several complicated mathematical formulae, Spurgeon concludes that the value of an annuity payable m times a year may be expressed as follows:

$$a_x^{(m)} = a_x + \frac{m-1}{2m}$$

($a_x^{(m)}$ represents the present value of an annuity of 1 per annum payable during the life of x in installments of $\frac{1}{m}$ at the end of successive $\frac{1}{m}$ ths of each year; a_x represents the present value of an annuity of 1 per annum payable annually over the life of x , and m represents the number of times year the annuity is to be paid.)

Substituting for m , the figure 4 (since the annuity here involved is payable quarterly), the equation becomes as follows:

$$a_x^{(4)} = a_x + \frac{4-1}{2 \times 4}$$

$$a_x^{(4)} = a_x + \frac{3}{8}$$

$$a_x^{(4)} = a_x + .375$$

In other words, the value of an annuity payable quarterly is equal to the value of such an annuity payable annually, plus .375.

Thus, we have a mathematical formula set forth in the "Actuaries' Bible" which the Court itself can prove. We

have uncontradicted expert testimony that the factor set forth in the formula "is the factor that is used by all actuaries in determining quarterly payments from the value of annual payments" (R. 98). We have another "standard book used by actuaries and accountants," Glover's "Tables of Applied Mathematics in Finance, Insurance and Statistics," (R. 127) which indicates that the formula the Commissioner uses in his regulations is one applicable only where interest is involved, as in the case of income for a term certain, and not where both interest and mortality are involved as in the instant life estate.*

With uncontradicted expert evidence to the above effect and with no evidence at all on the part of the respondent what greater proof can there possibly be that the proper quarterly factor is the one claimed by the petitioner. Yet the opinion of the Tax Court states that there was no "significant evidence as to the derivation of the factor" which the petitioner seeks to have applied (R. 57). It is not often that there is submitted to a Court proof that can be demonstrated mathematically. With all due respect to

*The Commissioner in his regulations uses the same quarterly factor both where a life estate is involved and where a "term certain" is involved. Regulations 105, section 81.10(i)(10) provides: "In the case of an annuity under which the decedent was entitled during a *term-certain* to receive payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the applicable factor in column of Table B and the product is to be multiplied by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments." [Italics supplied.]

(The entire text of section 81.10(i) including Table B is given in the Appendix.)

The Commissioner is correct in using his quarterly factor in case of a term certain but he is in error in its use in case of life estate.

the Tax Court, its conclusions may be described in the words of the Court of Appeals for the Third Circuit in *Estate of Lueders v. Commissioner* (C.A. 3, 1947) 164 Fed. (2d) 128, when in reversing the Tax Court, it stated: "the sole source of the Tax Court's finding * * * flowed from what may be described as the intuitive processes of the Tax Court."

To paraphrase Mr. Justice Holmes in *New York Trust Co. v. Eisner* (1921), 256 U.S. 345, a mathematical equation on an issue such as the quarterly factor is worth a volume of logic.

The opinion of the Tax Court states:

"* * * He [Mr. Waites] testified further that the value of a life annuity, payable quarterly, is less than the value of an annuity certain, payable quarterly, for a term equal to the annuitant's life expectancy. Yet the factor petitioner urges and the method of its application lead to a higher value for a life annuity. This discrepancy could not be adequately explained by petitioner. * * *" (R. 57.)

The Tax Court is in error in stating that "the factor petitioner urges and the method of its application lead to higher value for a life annuity." There is no discrepancy here to be explained away.

Under the 1937 Standard Annuity Mortality Table, the value of a life annuity of \$1.00 a year payable quarterly for Mrs. Koshland's life is \$11.34913. The value of an annuity certain payable quarterly for Mrs. Koshland's life expectancy is between \$11.82568 and \$12.34670. Under the Actuaries' or Combined Experience Mortality Table, the corresponding figures are \$7.89976 in the case of a

life annuity and between \$8.23158 and \$8.89083 in the case of an annuity certain for Mrs. Koshland's life expectancy.*

The data on which these figures are based are stated in the footnote.† It should be noted that every item used in the computations is found either in the record or in the Commissioner's regulations.

*To obtain the actual values in Mrs. Koshland's case, these various factors would be multiplied by \$15,000, her annual income. It is obvious that such multiplication would not change the result.

†An individual age 66 (Mrs. Koshland's age at her husband's death) has, according to the Actuaries' or Combined Experience Mortality Table used by respondent, a life expectancy of 10.46 years (Pet. Ex. 8, R. 161). The value of an annuity of \$1.00 per year payable at the end of each year to such an individual, according to the Actuaries' or Combined Experience Table, is \$7.52476 (Table A, Reg. 105, Sec. 81.10(i)). The value of an annuity of \$1.00 payable at the end of each year for 10 years is \$8.11089; the value of one similarly paid for 11 years is \$8.7604 (Table B, Reg. 105, Sec. 81.10(i)). (Since the life expectancy is 10.46 or between 10 and 11 years, both the 10-year and the 11-year periods are used in order to avoid any controversy as to which period should be used.)

The value of an annuity of \$1.00 per year payable quarterly to an individual age 66 may be obtained, according to petitioner's method, by adding the factor .375 to the value for annual payments (\$7.52476) which results in a total value of \$7.89976. The value of an annuity of \$1.00 per year payable quarterly for a period of 10 years may be obtained by multiplying the value of annual payments per Table B (\$8.11089) by the factor 1.0148 which results in a value of \$8.23158. (It is agreed by both parties that the quarterly factor of 1.01488 is correctly used where annuities for a term-certain are concerned.) The value of an annuity certain of \$1.00 per year payable quarterly for a period of 11 years, obtained in the same manner, is \$8.89083. Thus the use of petitioner's quarterly factor with the Actuaries' or Combined Experience Table results in a value for a "life annuity, payable quarterly" (\$7.89976) less than the value of an "annuity certain payable quarterly for a term equal to the annuitant's life expectancy" (between \$8.23158 and \$8.89083).

The same result is obtained if the 1937 Standard Annuity Mortality Table is used. By use of petitioner's actuarial factor of .375 for quarterly payments, the value of an annuity of \$1.00

Thus, it is obvious that under both the petitioner's 1937 mortality table and the Commissioner's Actuaries' or Combined Experience Table, the value of an annuity certain payable quarterly for a term equal to Mrs. Koshland's life expectancy is higher than the value of an annuity merely for her life. The Tax Court is in error in its statement to the contrary, and there is no discrepancy in Mr. Waites' testimony to be explained.

It is true that there is some confusion in the record but it is the confusion of counsel for respondent who stated that he was "confused indeed" (R.138), "certainly confused" (R.138), and "obviously confused" (R.139). With these statements petitioner's counsel does not quarrel and it is apparent from the Tax Court's decision that respondent's counsel's confusion obfuscated the record enough to confuse the Tax Court. However, as above pointed out, simple arithmetic supports the uncontradicted testimony of Mr. Waites.

The Tax Court's error with regard to the quarterly factor is even more shocking than its error with regard to the mortality table. There was a time, though that time

per year payable quarterly over the lifetime of a woman age 66 determined to be \$11.34913 (R. 105). Under the 1937 Standard Annuity Table, a woman age 66 has a life expectancy of 16.90 years (Pet. Ex. 8, R. 161). The value of an annuity of \$1.00 a year payable quarterly for a period of 16 years is \$11.82568; but for a period of 17 years is \$12.34670. (Since the life expectancy is 16.90, both the 16-year and the 17-year periods are taken.) The values were obtained by multiplying the values contained in Table B, Reg. 105, Sec. 81.10(i) — \$11.65229 and \$12.16567 respectively—by the quarterly factor of 1.01488. Here again the use of petitioner's quarterly factor with the 1937 table results in a value for a "life annuity, payable quarterly" (\$11.34913) less than the value of an "annuity certain payable quarterly for a term equal to the annuitant's life expectancy" between \$11.82568 and \$12.34670).

ended well prior to 1900 (R. 78), when the Actuaries' or Combined Experience Mortality Table could with propriety have been used. The use, however, of the Commissioner's quarterly factor for a life estate has always been wrong. There never was a time when it was right, and there never will be since it is based only on the interest factor and ignores the mortality factor and hence is actuarially unsound (R. 107-110).

Petitioner's quarterly factor is applicable to all mortality tables and not merely to the 1937 Standard Annuity Mortality Table (R. 115-116). Even assuming that this Court should find that on the evidence it cannot reverse the Tax Court upon its failure to use the 1937 Standard Annuity Mortality Table, nevertheless, the Tax Court should be reversed on its failure to use the proper quarterly factor. The authorities have been referred to above in connection with the discussion as to the proper mortality table and need not be cited again here.

3. Assuming That the Tax Court Did Not Err in Failing to Value Said Life Estate Upon the Basis of Said 1937 Table, It Erred in Valuing Said Life Estate Upon the Basis of the Actuaries or Combined Experience Mortality Table. In View of the Uncontradicted Evidence, It Erred in Failing to Find the Respondent's Use of Said Table to Be Arbitrary and Invalid and in Failing to Place on the Respondent the Burden of Proof with Regard to the Correct Table.

Petitioner submits that on the uncontradicted evidence in this case, Mrs. Koshland's life estate should be valued on the basis of the 1937 Standard Annuity Mortality Table and upon the basis of the petitioner's quarterly factor, and that the Tax Court should be reversed with instructions to enter its decision accordingly.

Assuming, however, that this Court should find that the petitioner has failed to establish that the life estate should be valued under the 1937 table, it is submitted that petitioner has established conclusively that the Commissioner was in error in his use of the Actuaries' or Combined Experience Mortality Table, that his action in this regard was arbitrary and invalid and that the case should be remanded to the Tax Court for further hearing with the burden of proof as to the appropriate mortality table placed upon the respondent.

The evidence establishing that the Actuaries' or Combined Experience Table of Mortality has long been obsolete has been set forth *supra* and need not be repeated here.

Not only the evidence but the Tax Court's own findings of fact require reversal of its decision. It found:

"This table [the Actuaries' or Combined Experience Table of Mortality] is the result of experience of seventeen British life insurance companies covering a period from 1762 until 1837; *it makes no distinction between the length of male lives and the length of female lives.*" (R. 45.) [Italics supplied.]

It further found:

"*Modern experience has demonstrated that females live longer than males, and some annuity tables now do take this factor into account.*" (R. 46.) [Italics supplied.]

It is submitted that upon the basis of the italicized findings it is clear without more that the use of the Actuaries' or Combined Experience Table was arbitrary and invalid. The Tax Court found, to use Mr. Justice Douglas'

words in another connection in *Ballard v. United States* (1946), 329 U.S. 187 at 193, that "The truth is that the two sexes are not fungible" when it comes to life expectancies, yet it determined the value of Mrs. Koshland's life estate upon the basis of an ancient mortality table that treats the sexes as fungible.

Petitioner relies upon the record as a whole as well as upon the findings mentioned to bring the case within the rule of *Helvering v. Taylor* (1935), 293 U.S. 507.

In that case, the United States Supreme Court said:

"We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower courts may not be harmonious, our attention has not been called to any that persuasively supports the rule for which the commissioner here contends.

Unquestionably the burden of proof is on the taxpayer to show that the commissioner's determination is invalid. *Lucas v. Structural Steel Co.*, 281 U.S. 264, 271. *Wickwire v. Reinecke*, 275 U.S. 101, 105. *Welch v. Helvering*, 290 U.S. 111, 115. Frequently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due. See e.g., *Darcy v. Commissioner*, 66 F.(2d) 581, 585. But where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe

unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax. The rule for which the commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals. The Circuit Court of Appeals rightly reversed and remanded the case for further proceedings in accordance with its opinion."

See also the decision of this Court in *Commissioner v. Hellogg* (C.A. 9, 1941), 119 Fed.(2d) 115, and the following cases decided by courts of appeal of other circuits:

National Lumber and Tie Co. v. Com. (C.A. 8, 1937), 90 Fed.(2d) 216;

Johnson v. Com. (C.A. 8, 1937), 88 Fed.(2d) 952;

Clements v. Com. (C.A. 8, 1937), 88 Fed.(2d) 791;

Durkee v. Com. (C.A. 6, 1947), 162 Fed.(2d) 184;

Est. of C. B. DuCharme (C.A. 6, 1947), 164 Fed.(2d) 959, modified on other issues (C.A. 6, 1948), 169 Fed.(2d) 76;

Tex-Penn Oil Co. v. Com. (C.A. 3, 1936), 83 Fed.(2d) 518, aff'd (1937), 300 U.S. 481;

Worcester County Trust Co. et al., Exrs., v. Com. (C.A. 1, 1943), 134 Fed.(2d) 578.

In the *Worcester County Trust Co.* case, the Court said:

"* * * We are not sure whether it [the Board of Tax Appeals] sustained the Commissioner's deter-

mination of value because in its opinion the taxpayers had failed to introduce evidence sufficient to persuade it that his determination was incorrect, or whether it found the Commissioner's determination incorrect but nevertheless sustained him because it thought that the taxpayers had not gone further and introduced evidence sufficient to show that some valuation other than his was correct. This is not vital however, because we find in the record evidence which persuades us that the Board's determination of value was 'arbitrary and excessive' or 'without rational foundation and excessive' (to quote the Supreme Court's actual words), and under the rule of the *Taylor* case, this requires that we should reverse the Board and remand the case to it for further action on the question of the value of the stock regardless of whether or not the taxpayers' 'evidence was sufficient also to establish the correct amount that lawfully might be charged against him.' "

4. **Assuming That the Tax Court Did Not Err in Failing to Use Petitioner's Quarterly Factor in the Valuation of Said Life Estate, It Erred in Using the Respondent's Quarterly Factor in Said Valuation. In View of the Uncontradicted Evidence, It Erred in Failing to Find the Use of Respondent's Factor to Be Arbitrary and Invalid and in Failing to Place on the Respondent the Burden of Proof with Regard to the Correct Factor.**

The discussion above with regard to the proper mortality table likewise applies but with even more effect to the quarterly factor. There is no need to add to what has already been said under Part 2 of the Argument on the matter.

CONCLUSION

The evidence is uncontradicted that the Actuaries' or Combined Experience Table of Mortality is obsolete and that it is erroneous in the instant case to use the respondent's quarterly factor. The Tax Court itself in the case of *Anna L. Raymond* (1939), 40 B.T.A. 244, aff'd on another point (C.A. 7, 1940), 114 Fed.(2d) 140 cert. den. 311 U.S. 710, found the respondent's table to be obsolete.

Sometimes in tax cases, the "inarticulate major premise" of a difficult to justify and inequitable decision is the government's need for revenue. To use the words of Mr. Justice Frankfurter in the dissenting opinion in *Commissioner v. Wodehouse* (1949), U.S., 69 S.Ct. 1120, courts sometimes appear " * * * to be guided, in however low a key that consideration is pitched, in construing the applicable provisions of the Internal Revenue Code by the urgent need for revenue."

Even such a consideration cannot justify the Tax Court's decision in the instant case. While the Commissioner's use of an obsolete mortality table and of an erroneous quarterly factor in the instant case hurts the taxpayer, in many cases and probably in most cases it is detrimental to the revenue. The instant case is one where it is to the Commissioner's advantage to decrease the value of the life estate and increase the value of the remainder, because the life estate is not subject to the estate tax whereas the remainder is. More common than the instant case, however, is the case where the decedent's will leaves his property in trust, income to his wife or other beneficiaries for life and remainder over to charity. In such a case the life estate is taxable and the remainder is

exempt, and it is to the advantage of the revenue to increase the value of the life estate and decrease that of the remainder. The use of the Commissioner's mortality table and quarterly factor in such a case decreases the value of the life estate and increases that of the remainder.

One wonders what force of administrative inertia has led the Commissioner to persist in the use of an obsolete mortality table which was published in 1843 (R. 78), over 100 years ago, and which is based on English experience which goes back almost 200 years (1762-1837, R. 45). One wonders likewise how the Commissioner made and why he has persisted in his error with regard to the quarterly factor. Regardless, however, as to the causes for the Commissioner's perseverance in his errors, the effects are detrimental to the revenue in probably more cases than they are detrimental to taxpayers.

On an ever-increasing scale, the Government is a partner these days in life and in death. It takes its substantial share from the living and upon death, it is a tearless beneficiary. Such partnership is inevitable, but certainly it should be in accordance with law. By the use of an erroneous mortality table and of an erroneous quarterly factor, the Government is seeking from the instant taxpayer more than the share which the Internal Revenue Code allots to it, and it is doing this furthermore on a basis which is in general detrimental to the revenue.

If petitioner had confined itself to introducing the uncontradicted evidence which is in the record on the obsolescence of the respondent's mortality table, then *Holmes v. Taylor* (1935), 293 U.S. 507 would require the

he Tax Court's decision be reversed and the case remanded for further hearing. Out of an excess of caution, petitioner has argued in the alternative the applicability of *Helvering v. Taylor*.

Petitioner, however, went beyond merely exposing respondent's errors and introduced uncontradicted evidence establishing the applicability of the 1937 table and of petitioner's quarterly factor. Respondent has had his day in Court and has failed to offer any evidence at all. Petitioner submits that this Court should not merely remand but should reverse with instructions to enter a decision in petitioner's favor on the valuation issue.

Respectfully submitted,

SAMUEL TAYLOR,

EDGAR SINTON,

Counsel for Petitioner.

Dated: July 26, 1949.

(Appendix follows)







APPENDIX

Before the Tax Court, Internal Revenue Code Section 811(d)(2) and the regulations thereunder were applicable. Section 811(d)(2) and the regulations thereunder are printed on pages 47 and 48 of the Record. Petitioner has conceded the inclusion of the remainder under the trust in the gross estate, so these provisions of the Code and regulations are not pertinent on this petition for review.

Treasury Regulations 105, section 81.10(i)

(i) *Annuities, life, remainder, and reversionary interests.*—(1) If the executor adopts the option set forth in section 81.11, any annuity, life, remainder, or reversionary interest includible in the gross estate should be valued as of the date of the decedent's death in accordance with the provisions of this section and then such value should be adjusted as explained in section 81.11 for any difference in value between the date of death and the applicable subsequent date due to causes other than mere lapse of time. If the executor does not adopt the option set forth in section 81.11, the value of any such interest should be computed as hereinafter prescribed without such further adjustment for any decrease or increase in the value of the property subsequent to the date of death.

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of, or upon the termination of a life or of lives, the Actuaries' or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday. Table A, a part of this section, gives factors applicable to a case in which only one life is involved. (See paragraphs (4) to (8), inclusive.) Table B, a part of this section, gives factors applicable to a case in which only a term-certain is involved. (See paragraphs (9) to (11), inclusive.) If the time of payment or of payments is dependent upon the continuation of, or termination of more than one life, or there is a term-certain concurrent with one or more lives, a special computation in accordance with the first two sentences of this paragraph is necessary. A case requiring a special computation may be stated to the Commissioner who will furnish the applicable factor, provided such request is made sufficiently in advance of the due date of the return. Such request must fully disclose all relevant facts. The date of birth of each person, the duration of whose life may affect the value of the interest, should be established by affidavit.

(4) If the decedent had a remainder interest in property subject to the life estate of another, the present worth of the remainder interest at the time of death should be obtained by multiplying the value of the property at the time of death by the figure in column 3 of Table A opposite

ite the number of years nearest to the actual age of the life tenant.

Example. The decedent was entitled to receive property worth \$50,000 upon the death of his elder brother, to whom the income for life had been bequeathed. The brother at the time of the decedent's death was 31 years 5 months old. By reference to Table A, it is found that the figure in column 3, opposite 31 years, is 0.31262. The present worth of the remainder interest at the date of death is, therefore, \$15,631 (\$50,000 multiplied by 0.31262).

(5) In case the decedent was entitled to receive an annuity of a definite amount during the lifetime of another person, payable at the end of annual periods, the present worth at the time of the decedent's death must be computed upon the basis of the value of a life annuity at the age of the other person. The amount payable annually should be multiplied by the figure in column 2 of Table A opposite the number of years in column 1 nearest to the actual age of the other person.

Example. The decedent received under the terms of his father's will an annuity of \$10,000 for the life of his elder brother. The brother at the decedent's death was 40 years 8 months old. By reference to Table A, the figure in column 2 opposite 41 years, the number nearest to the brother's actual age, is found to be 14.86102. The present worth of the annuity at the date of the decedent's death is, therefore, \$148,610.20.

(6) In the case of an annuity under which the decedent was entitled to receive during the life of another pay-

ments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the figure in column 2 of Table A opposite the number of years in column 1 nearest the actual age of the person whose life measures the duration of the annuity, and then multiplying the product by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments.

Example. If, in the example given in paragraph (5), the annuity is payable in semiannual installments of \$5,000 at the end of each semiannual period, the aggregate annual amount, \$10,000, should be multiplied by the factor 14.86102, and the product should be multiplied by 1.00990. The present worth of the annuity at the date of death is, therefore, \$150,081.44 ($\$10,000 \times 14.86102 \times 1.00990$).

(7) If the first payment of an annuity for the life of an individual is to be paid at once, the value of the annuity is the sum of the first payment plus the present worth of a similar annuity, the first payment of which is not to be made until the end of the first period.

Example. The decedent was entitled to receive an annuity of \$50 a month payable during the life of another. The decedent died on the day a payment was due. At the date of the decedent's death the person whose life measures the duration of the annuity was 50 years of age. The value of the annuity at the date of decedent's death is \$50 plus the product of $\$50 \times 12 \times 12.47032$ (see Table A) $\times 1.01820$ (see preced

ing paragraph (6)), or \$7,668.38 [$\50 plus $(\$50 \times 12 \times 12.47032 \times 1.01820)$].

(8) If the decedent was entitled to receive the entire income of certain property during the life of another person, or was entitled to the use of nonincome-producing property during the life of another person, a hypothetical annuity at a rate of 4 per cent of the value of the property should be made the basis of the calculation. A provision for the payment of income in semiannual, quarterly, or monthly installments does not affect the value to be assigned to the life interest.

Example. The decedent was entitled to receive the income from a fund of \$100,000 during the life of a person 41 years old. The value of a hypothetical annuity of \$4,000, dependent upon the life of such a person, is indicated by the table to be \$59,444.08 (\$4,000 multiplied by 14.86102).

(9) If the decedent was entitled to receive property at the end of a specified number of years, Table B or an extension thereof should be used.

Example. The decedent, who was entitled to receive \$100,000 at a certain date, died 30 years prior to such date. The value of his right is the product of \$100,000 multiplied by 0.308319, the factor in column 3, Table B, opposite 30 years in column 1.

(10) In the case of an annuity under which the decedent was entitled during a term-certain to receive payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiply-

ing the aggregate amount to be paid within a year by the applicable factor in column 2 of Table B and the product is to be multiplied by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments.

Example. The decedent was an annuitant for a term-certain, being entitled to \$1,000 annually payable in installments of \$500 at the end of each semiannual period. A semiannual payment of \$500 had been made just before the death of the decedent and there remained 20 payments to be made over a period of 10 years. The value of the annuity as of the date of the decedent's death is the product of $\$500 \times 20 \times 8.11089$ (see Table B) $\times 1.00990$, or \$8,191.19.

(11) If the first payment of an annuity for a definite number of years is to be paid at once, the applicable factor is the product of the factor shown in Table B multiplied by 1.02154 for monthly payments, by 1.02488 for quarterly payments, by 1.02990 for semiannual payments or by 1.04 for annual payments.

Example. The decedent was the beneficiary of an annuity of \$50 a month. On the day a payment was due, the decedent died. There were 300 payments to be made, including the payment due. The value of the annuity as of the date of decedent's death is the product of $\$50 \times 12 \times 15.62208$ (see Table B) $\times 1.02154$, or \$9,575.15 ($\$50 \times 12 \times 15.62208 \times 1.02154$).

interest, and of a reversionary interest

1	2	3	1	2	3
Age	Annuity, or present value of \$1 due at the end of each year during the life of a person of specified age <i>Annuity</i>	Reversion, or present value of \$1 due at the end of the year of death of a person of specified age <i>Reversion</i>	Age	Annuity, or present value of \$1 due at the end of each year during the life of a person of specified age <i>Annuity</i>	Reversion, or present value of \$1 due at the end of the year of death of a person of specified age <i>Reversion</i>
0	\$14.72829	\$0.39507	50	\$12.47032	\$0.48191
1	17.30771	.29586	51	12.17919	.49311
2	18.69578	.24247	52	11.88408	.50446
3	19.15901	.22465	53	11.58531	.51595
4	19.41226	.21491	54	11.28325	.52757
5	19.55301	.20950	55	10.97789	.53931
6	19.61731	.20703	56	10.66982	.55116
7	19.62502	.20673	57	10.35931	.56310
8	19.61097	.20727	58	10.04630	.57514
9	19.53413	.21022	59	9.73131	.58726
10	19.45359	.21332	60	9.41474	.59943
11	19.36943	.21656	61	9.09765	.61163
12	19.28184	.21993	62	8.78052	.62383
13	19.19065	.22344	63	8.46412	.63600
14	19.09590	.22708	64	8.14888	.64812
15	18.99764	.23086	65	7.83552	.66017
16	18.89569	.23478	66	7.52476	.67212
17	18.79010	.23884	67	7.21699	.68397
18	18.68070	.24305	68	6.91298	.69565
19	18.56751	.24740	69	6.61301	.70719
20	18.45038	.25191	70	6.31716	.71857
21	18.32932	.25656	71	6.02612	.72976
22	18.20416	.26138	72	5.74003	.74077
23	18.07471	.26636	73	5.45928	.75157
24	17.94097	.27150	74	5.18402	.76215
25	17.80274	.27682	75	4.91463	.77251
26	17.65984	.28231	76	4.65125	.78264
27	17.51224	.28799	77	4.39383	.79254
28	17.35968	.29386	78	4.14286	.80220
29	17.20225	.29991	79	3.89858	.81159
30	17.03961	.30617	80	3.66071	.82074
31	16.87176	.31262	81	3.42900	.82965
32	16.69846	.31929	82	3.20258	.83836
33	16.51964	.32617	83	2.98024	.84691
34	16.33503	.33327	84	2.76106	.85534
35	16.14437	.34060	85	2.54366	.86371
36	15.94755	.34817	86	2.32795	.87200
37	15.74427	.35599	87	2.11384	.88024
38	15.53421	.36407	88	1.90115	.88842
39	15.31722	.37241	89	1.69107	.89650
40	15.09295	.38104	90	1.48540	.90441
41	14.86102	.38996	91	1.28432	.91214
42	14.62122	.39918	92	1.09024	.91961
43	14.37356	.40871	93	.90647	.92667
44	14.11860	.41852	94	.73687	.93320
45	13.85713	.42857	95	.58435	.93906
46	13.58958	.43886	96	.46182	.94378
47	13.31698	.44935	97	.36698	.94742
48	13.03942	.46002	98	.24038	.95229
49	12.75716	.47088	99	.00000	.96154

TABLE B

Table showing the present worth at 4 per cent of an annuity for a term-certain
and of a reversionary interest postponed for a term-certain

1	2	3	1	2	3
Number of Years	Present worth of an annuity of \$1, payable at the end of each year, for a certain number of years <i>Annuity</i>	Present worth of \$1, payable at the end of a certain number of years <i>Reversion</i>	Number of Years	Present worth of an annuity of \$1, payable at the end of each year, for a certain number of years <i>Annuity</i>	Present worth of \$1, payable at the end of a certain number of years <i>Reversion</i>
1	\$0.96154	\$0.961538	16	\$11.65229	\$0.533908
2	1.88609	.924556	17	12.16567	.513373
3	2.77509	.888996	18	12.65929	.493628
4	3.62989	.854804	19	13.13394	.474642
5	4.45182	.821927	20	13.59032	.456387
6	5.24214	.790314	21	14.02916	.438834
7	6.00205	.759918	22	14.45111	.421955
8	6.73274	.730690	23	14.85684	.405726
9	7.43533	.702587	24	15.24696	.390121
10	8.11089	.675564	25	15.62208	.375117
11	8.76047	.649581	26	15.98277	.360689
12	9.38507	.624597	27	16.32958	.346816
13	9.98565	.600574	28	16.66306	.333477
14	10.56312	.577475	29	16.98371	.320651
15	11.11839	.555265	30	17.29203	.308319

No. 12,228

**In the United States Court of Appeals
for the Ninth Circuit**

**ESTATE OF ABRAHAM KOSHLAND, DECEASED, JESSE
KOSHLAND, EXECUTOR, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
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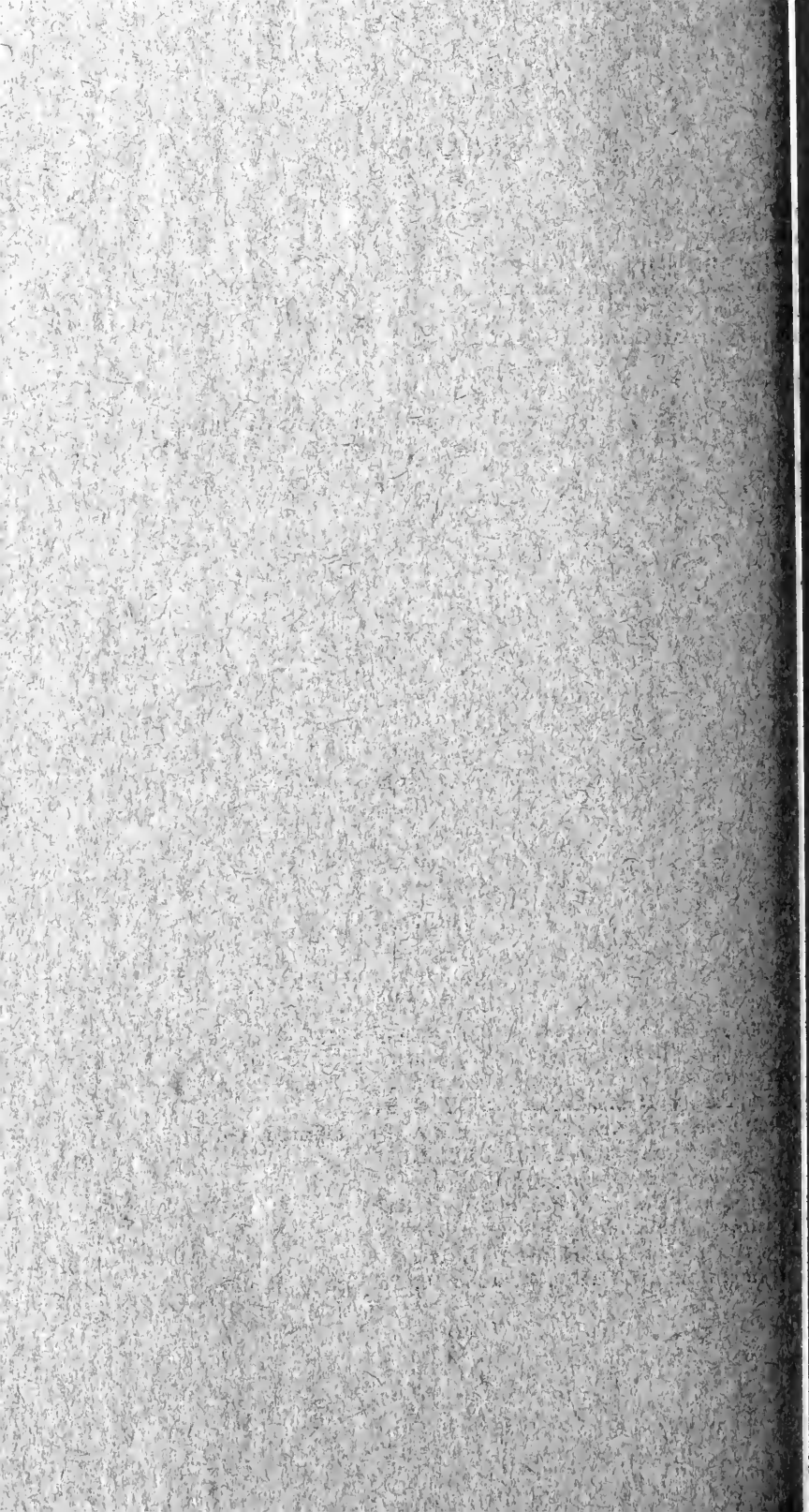
**ELLIS N. SLACK,
L. W. POST,**
Special Assistants to the Attorney General.

FILED

AUG 30 1949

PAUL P. O'BRIEN,

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 36-57) is reported
in 11 T. C. 904.

JURISDICTION

This case involves federal estate taxes. The Commissioner's notice of deficiency (R. 11-15) was mailed to the taxpayer on or about April 7, 1947 (R. 4, 11, 28). Within 90 days thereafter, and on May 5, 1947, the taxpayer filed his petition with the Tax Court for redetermination under Section 871(a) of the Internal Revenue Code. (R. 1.) The decision of the Tax Court that there is a deficiency in estate tax in the amount of \$33,119.49 was entered on February 25, 1949. (R. 3, 57-58.) The case is brought to this Court by petition for review filed

March 21, 1949 (R. 3, 58-62), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court correctly held that the value of the remainder interest in a trust should be computed in accordance with the applicable regulations (Treasury Regulations 105, Sec. 81.10(i)).

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The facts found by the Tax Court so far as material hereto may be summarized as follows:

The decedent died on April 15, 1944, and his estate is in the process of administration in California. The estate tax return of the taxpayer estate was filed with the Collector of Internal Revenue for the First District of California. At the time of his death decedent was 72 years old, and his wife, Estelle W. Koshland, who was still living at the time this case was tried, was 66 years old. (R. 38.)

On December 26, 1922, the decedent created a trust by transferring certain securities, which had a cost to him of \$290,596, to Jesse Koshland and Stanley H. Sinton (a nephew) who declared themselves trustees of this property in a declaration of trust, the pertinent provisions of which read as follows (39, 41):

Second: For and during the lifetime of Estelle W. Koshland of said Boston the income of this trust less proper charges and deductions including the payment of such taxes, municipal, state or Federal as may be levied thereon, shall be paid over unto her semi-annually, quarterly or oftener for

and during her lifetime and upon her death then said income shall be paid over unto Abraham Koshland * * *.

Fourth: At any time or during any period when no income is received, or where the income received is less than Fifteen Thousand (15,000) Dollars in any year, the Trustees may, upon the application of any beneficiary, apply and expend such part of the principal of the fund as may be necessary:

(a) To provide either the said Estelle W. Koshland or the said Abraham Koshland with an income of Fifteen Thousand (15,000) Dollars for such year; * * *

On December 26, 1923, decedent, for the first and only time, amended this trust. (R. 43.) The amendment cancelled Articles 7 and 8 of the original declaration of trust and substituted therefor a new provision which reads in part as follows (R. 43):

7. Power is hereby reserved during the lifetime of the said Abraham Koshland and given to the said Abraham Koshland and Estelle W. Koshland with the approval of the Trustees hereof at any time in the uncontrolled discretion of the said Abraham Koshland and Estelle W. Koshland to amend this declaration of trust, * * *.

All of the income of this trust has been paid year by year to Estelle W. Koshland. Prior to 1931 this income was in excess of \$15,000 annually. Since then, it has fluctuated between \$10,000 and \$14,000. Although she has not made any application to the trustees for the payment from trust principal of any amount necessary to bring her income to the sum of \$15,000, it was the intent of the decedent and the understanding of the trustees that she have this right; and the Commissioner conceded in his Tax Court brief that she is and was

entitled to an annual income from the trust in the amount of \$15,000. (R. 44.)

At the time of decedent's death, as well as at the time of the hearing in this proceeding (March 23, 1948) decedent's wife was in good health, and her personal physician expected her to live out her normal life expectancy. (R. 44.)

Decedent's power of amendment of the trust was unrestricted and was exercisable by him with a person not having a substantial adverse interest in the remainder. (R. 44-45.)

The fair market value of the trust estate, as of the date of decedent's death, was \$231,524.64. (R. 45.)

In determining the value of the remainder interest which is includible in decedent's gross estate, the Commissioner subtracted from the value of the trust estate the value of decedent's wife's life estate, calculating this value in conformity with Table A appearing in Treasury Regulations 105, Sec. 81.10(i). This table is based upon the Actuaries' or Combined Experience Table of Mortality. (R. 45.)

This table is the result of experience of seventeen British life insurance companies covering a period from 1762 until 1837; it makes no distinction between the length of male lives and the length of female lives. (R. 45.)

Many other tables of mortality have been in widespread use. The Actuaries' or Combined Experience Table of Mortality is not now used by insurance companies in computing annuities. Insurance companies do not use annuity mortality tables in determining life insurance premiums or in calculating life insurance reserves. Annuity mortality tables reflect only the experience of insurance companies with annuitants as a class. They do not purport to reflect the general mortality experience. Annuitants, as a rule, are a self-

selected group and tend to outlive the average. For the purpose of computing life insurance premiums, insurance companies use their own mortality tables based upon their individual experience. (R. 45.)

Modern experience has demonstrated that females live longer than males, and some annuity tables now do take this factor into account. (R. 46.)

The 1937 Standard Annuity Table has been used by insurance companies and by actuaries as a basis for determining annuities and life estates since 1937. The table is used for both male and female lives, except that the age of the female is taken at an age five years younger than the male life. It is one of the most current tables in use for the evaluation of annuities. (R. 46.)

The table currently used by insurance companies for purposes of reserves and the like and considered as reflecting general mortality experience is the Insurance Commissioners' 1941 Standard Ordinary Table of Mortality. This table is based upon experience in the years 1934 to 1936, with adjustment for possible epidemics and other catastrophes. (R. 46.)

Decedent's wife's expectation of life, under various mortality tables, is as follows (R. 46):

<i>Mortality Table</i>	<i>Age 66</i>
Combined Experience or Actuaries'	10.46
American Experience	10.54
Insurance Commissioners' 1941 Table..	11.01
American Annuitants'	11.95
Combined Annuity—	
Male	12.17
Female	14.52
1937 Standard Annuity—	
Male	13.81
Female	16.90

The proper factor for quarterly payments is .01488, to be multiplied by the annuity value of the

annual payments to Estate of Koshland under the trust. (R. 46-47.)

The value of the trust remainder, includible in decedent's gross estate, is \$116,973.71. (R. 47.)

The Tax Court held (R. 54-57) that in computing the value of the life interest which is to be subtracted from the value of the trust assets it was proper to use the mortality table and factor for quarterly payments in conformity with the regulations (Treasury Regulations 105, Sec. 81.10(i)).

SUMMARY OF ARGUMENT

In computing the value of the remainder interest in question, it is agreed that the value of the wife's life estate should be subtracted from the value of the trust property. The value of the trust property is not in dispute, and the area of disagreement is as to the value of the life interest which is to be subtracted.

The Commissioner evaluated that life interest in accordance with the regulations and the Tax Court correctly upheld his action. The taxpayer failed to discharge the burden of showing that the Commissioner's action was wrong or that the regulations are unsound. They should, therefore, be accepted here as they were in the Tax Court.

ARGUMENT

The Remainder Interest Here Involved Was Properly Valued in Accordance With the Regulations

This appeal involves only the question whether the remainder interest to be included in the decedent's gross estate under Sec. 811(d)(2) of the Internal Revenue Code (Appendix, *infra*), was properly valued in accordance with the regulations (Treasury Regulations 105, Sec. 81.10(i), Appendix, *infra*). In the Tax Court proceedings the taxpayer contended that the remainder interest was not includible at all but he has now aban-

tioned that contention (Br. 3, Appendix to Br., p. 1), and as above noted the only question now presented is the one as to value.

In his original determination the Commissioner computed the value of the remainder interest as follows (R. 14):

Fair market value of trust estate	
4-15-1944	\$231,524.64
Less—value of life estate held by	
Estelle Koshland: Date of birth,	
4-8-1878 — Age 4-15-1944, 66	
years	
Annual income on \$231,-	
524.64 at 4%	\$ 9,260.99
Table A factor for \$1.00	
annuity at 66	7.52476
Annuity value of an-	
nual income (7.52476	
of \$9,260.99)	\$69,686.73
Factor for quarterly	
payments	1.01488
Value of life tenancy 4-15-1944	
(1.01488 of \$69,686.73)	70,723.67
	<hr/>
Value of trust includible in gross	
estate	\$160,800.97

On brief in the Tax Court the Commissioner conceded (R. 44) that the figure for annual income payable to the wife from the trust should be increased to \$15,000 and revised his computation accordingly as follows:

Fair market value of trust estate		
4-15-44	\$231,524.64	
Less:		
Annual income	\$15,000.00	
Table A factor for \$1.00		
annuity at 66	7.52476	
Annuity value of annual		
income (7.52476 x		
15,000.00)	112,871.40	
Factor for quarterly		
payments	1.01488	
Value of life tenancy 4-15-44		
(1.01488 x 112,871.40)	114,550.93	
		<hr/>
Value of trust remainder includible		
in gross estate	\$116,973.71	

The Tax Court accepted that concession and computation and specifically found as a fact that the value of the trust remainder, includible in decedent's gross estate, is \$116,973.71. (R. 47.)

The computation that the Tax Court approved was based upon the Actuaries' or Combined Experience Table of Mortality which is prescribed by the regulations (Treasury Regulations 105, Sec. 81.10(i), *supra*).

The Tax Court held that the use of that table was proper and in so holding it relied upon its own prior decisions in *Estate of Hart v. Commissioner*, 1 T. C. 989; *Du Pont v. Commissioner*, 2 T. C. 246; *Affelder v. Commissioner*, 7 T. C. 1190; *Estate of Bartman v. Commissioner*, 10 T. C. 1073, which are all to the same effect.

Thus, in the *Hart* case which was not appealed the Tax Court said (p. 991):

Valuation for estate or inheritance tax purposes is computed in some 17 states by the use of the Actu

aries' or Combined Experience Mortality Table, with 4, 5, or 6 percent interest, and approximately 20 other states use the American Experience Table of Mortality, with interest at 5 or 6 percent. See Prentice-Hall, Inheritance and Transfer Tax Service (11th Ed.) vol. I, pp. 801-803. The life expectancy of a person aged 79 under the former table is 5.09 years; under the latter 4.8 years. In New York State the use of the Actuaries' or Combined Experience Table of Mortality, with 4 percent interest, is prescribed by statute, Tax Law, §249-v, which is binding in tax computations. See *In re Bowker's Estate*, 157 Misc. 341; 283 N.Y.S. 564.

* * *

The method of valuing the claim adopted by respondent was a proper one. "There may be better and more accurate methods, but we can not for that reason disapprove of a method long in use without evidence establishing a better one. *Simpson v. United States*, 252 U. S. 547." *F. J. Sensenbrenner*, 46 B.T.A. 713, 717-718.

It is true that in the *Raymond* case (*Raymond v. Commissioner*, 40 B.T.A. 244, affirmed on other grounds, 14 F. 2d 140 (C. A. 7th), certiorari denied, 311 U. S. 10), upon which the taxpayer relies heavily (Br. 10, 5), the Tax Court took the view that the Actuaries' or Combined Experience Table was shown to be outmoded and approved a later table called the American Annuity Mortality Table for purposes of determining the amount of the gift in that case. But as pointed out by the Tax Court in the instant case (R. 55-56), the *Raymond* case is distinguishable from the instant one because they involve different problems. In this connection the Tax Court aptly said (R. 56):

The table petitioner urges might be worthy of further consideration if our question were the cost of an annuity from a commercial insurance company. This was the underlying problem posed in

the *Raymond* case, and it was there considered proper to utilize a table that such companies were using in their annuity business. We observed in the *Bartman* case, *supra*:

* * * that insurance companies take into consideration the element of self selection in writing annuities; and that they use whatever tables are best suited for their particular needs. * * *

There is no showing here that the mortality of inheritors or donees closely resembles that of purchasers of annuity policies. In fact, contrary evidence appears in the record.

And in other Tax Court cases, the *Raymond* case has also been distinguished in similar manner. See *Estate of Hart v. Commissioner, supra*, p. 991; *Du Pont v. Commissioner, supra*, p. 257; *Affelder v. Commissioner, supra*, p. 1194; *Estate of Bartman v. Commissioner, supra*, p. 1079.

Moreover, the mortality table approved in the *Raymond* case (American Annuitants') shows a life expectancy for decedent's wife of 11.95 years which is about five years less than the figure of 16.90 years shown by the table (1937 Standard Annuity) for which taxpayer contends and in favor of which his expert witness, Mr. Waites, testified. This was noted by the Tax Court in this instant case (R. 46, 55); and the Tax Court concluded (R. 56), correctly we submit, that whatever may be the shortcomings of the table prescribed by the regulations and used here, which as above pointed out show a life expectancy for decedent's wife of 10.46 years, still taxpayer failed to show that the 1937 table or any other table not embodied in the regulations, must be applied in this proceeding.

The mortality table which was approved by the Tax Court in the instant case has long been used for tax purposes, both state and federal. See *Estate of Hart*

Commissioner, supra; *Estate of Bartman v. Commissioner, supra*; *Affelder v. Commissioner, supra*; *Du Pont v. Commissioner, supra*; *Simpson v. United States*, 252 U. S. 547; II Paul, Federal Estate and Gift Taxation (1942), Sec. 18.19, pp. 1264-1265; also 1946 Supplement, pp. 777-779; New York Tax Law, Sec. 249-V (59 McKinney's Consolidated Laws of New York Annotated, Part 2); *Matter of Bowker*, 157 N. Y. Misc. 341, 343-344; California Revenue and Taxation Code, Sec. 13953 (Deering's California Codes, Revenue and Taxation Code). See also *Ithaca Trust Co. v. United States*, 279 U. S. 151; *Smith v. Shaughnessy*, 318 U. S. 76; *Robinette v. Helvering*, 318 U. S. 184; *Merchants Bank v. Commissioner*, 320 U. S. 256; *Henslee v. Union Planters Bank*, 335 U. S. 595; *Fidelity-Philadelphia Trust Co. v. Commissioner*, 27 B.T.A. 972, 979-980.

The question here raised is not new and while the mortality table prescribed in the regulations was originally prepared a long time ago, has been in use for many years, and has been supplanted in certain states and for some purposes, still it is so ingrained in the Federal tax laws that it is believed it was properly used in the instant case.

This mortality table has long been included in the state tax regulations. See Treasury Regulations 37 (1919 ed.), Art. 20; Treasury Regulations 63 (1922 ed.), Art. 15; Treasury Regulations 68 (1924 ed.), Art. 13; Treasury Regulations 70 (1926 ed.), Art. 13; Treasury Regulations 70 (1929 ed.), Art. 13; Treasury Regulations 80 (1934 ed.), Art. 13; Treasury Regulations 80 (1937 ed.), Art. 10; Treasury Regulations 105, Sec. 1.10.

The table is also included in the gift tax regulations. See Treasury Regulations 79 (1932 ed.), Art. 19; Treasury Regulations 79 (1936 ed.), Art. 19; Treasury Regulations 108, Sec. 86.19(f).

Having stood for so long in the regulations this mortality table would seem to have attained a dignity and force akin to that of law. Cf. *Magruder v. Washington B. & A. Realty Corp.*, 316 U. S. 69; *Taft v. Commissioner*, 304 U. S. 351; *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459; *Maryland Casualty Co. v. United States*, 251 U. S. 342; *Morrissey v. Commissioner*, 29 U. S. 344.

The taxpayer says (Br. 7) that the incorporation of the table into the regulations does not give it binding force, citing *Hanley v. United States*, 63 F. Supp. 7 (C. Cls.), in support of that contention. In the *Hanley* case the Court of Claims held that the 4% interest factor was too great in the circumstances there presented and took the view that a lower interest factor should be used despite the provision for 4% in the regulations. We do not need to go into the wisdom of that decision for present purposes, since there is no question as to the interest rate in the instant case. The *Hanley* case involved no question as to life expectancy such as presented here.

Taxpayer cites (Br. 8) *Estate of Denbigh v. Commissioner*, 7 T. C. 387; *Estate of Jennings v. Commissioner*, 10 T. C. 323, where the court held that the life expectancy shown by the mortality table could be reduced in case of incurable disease or other similar considerations. But whatever may be thought as to the correctness of those decisions, they are without application here where the wife was in good health. (R. 44) Accordingly the standard table should be used in valuing her life estate.

It is true that Mr. Waites, the actuary who testified for the taxpayer in this case, said that the mortality table prescribed by the regulations is obsolete. (R. 93) Waites said that he preferred the 1937 Standard A

uity Table (R. 55, 101) but it was brought out on cross examination that the 1937 table is not in general use, being used by insurance companies only for the computation of annuities (see R. 118, 125).¹ It was also brought out on cross examination (R. 119) and the Tax Court found as a fact (R. 46) that the table currently used by insurance companies for purposes of reserves and the like and considered as reflecting general mortality experience is the Insurance Commissioners' 1941 Standard Ordinary Table. This table, which is not in evidence here (R. 119) would show a life expectancy of 11.01 years for the decedent's wife (R. 46, 121). And another table which has been used for general purposes, the American Experience Table, shows a life expectancy of 10.54 years for her. (R. 46, 118.) These figures are little more than the expectancy of 10.46 years shown by the table that the Commissioner used, and this confirms the view that such expectancy is not out of line with that shown by other tables that are used for general purposes as distinguished from those like the 1937 Standard Annuity Table which is not based upon general experience and is confined to the experience of a select group. In the circumstances we submit that the taxpayer has wholly failed in his effort to attack the table that the Commissioner used, and we further submit that it has not been shown to be so obsolete that it should no longer be used, and certainly taxpayer has failed to offer any adequate substitute.

¹ Waites testified as follows (R. 125):

Q. Mr. Waites, isn't it true that annuitants as a group are a select class of risks? By that I mean that the experience that insurance companies have had with annuitants and with the mortality rate of annuitants is not the same experience that you may have with the average run of persons, in that people who buy annuities are convinced that they will probably at least live if not outlive their life expectancy.

A. Yes, that is why they load their annuity rate so much, because they realize that the person is selecting against them.

The taxpayer says (Br. 24) that the Tax Court had no right to ignore the testimony of Mr. Waites with respect to the 1937 Standard Annuity Mortality Table. But it is clear from the findings of fact and opinion of the Tax Court that it did not ignore such testimony. It gave it consideration and concluded, as above pointed out, that the 1937 table is inapplicable in the circumstances of this case. Certainly the Tax Court was not obliged to accept the testimony of taxpayer's expert here, and cases such as *Belridge Oil Co. v. Commissioner*, 85 F.2d 762 (C. A. 9th), are in harmony with that view. The testimony of taxpayer's expert is at variance with the established practice of the Bureau in cases of this type and for the reasons given above and in the Tax Court's opinion we submit such practice is reasonable and in accordance with law.

In the light of the foregoing, we submit that the Tax Court made no error in upholding the use of the mortality table in the instant case.

It remains to consider the taxpayer's further contention that the Commissioner and the Tax Court failed to take into consideration the proper factor for quarterly payments. In this connection the Tax Court succinctly said (R. 56-57):

Even greater weakness pervades petitioner's argument as to the proper factor for quarterly payments. The actuarial expert testified that the factor respondent used was proper if only an annuity for a term certain were involved, but was not correct if the annuity were for life. He testified further that the value of a life annuity, payable quarterly is less than the value of an annuity certain, payable quarterly, for a term equal to the annuitant's life expectancy. Yet the factor petitioner urged and the method of its application lead to a higher value for a life annuity. This discrepancy could not be adequately explained by petitioner, nor was there any significant evidence as to the derivation

of the factor it sought to have us apply. Petitioner's view cannot be sustained. *Estelle May Affelder, supra.*

Taxpayer criticizes (Br. 29-40) the views of the Tax Court in this connection but does not adequately or satisfactorily explain away the discrepancy in Mr. Waites' testimony which the Tax Court noted. The testimony of Mr. Waites is opposed to the end result of its computation, and the theory advanced does not logically support the mathematical result reached. Indeed, they are plainly contradictory. Hence there is no basis for upsetting the factor which is included in the regulations,² and, we submit, it should be accepted here as it was in the Tax Court.

The taxpayer makes a peculiar alternative argument (Br. 40-44) to the effect that even though the 1937 table be considered inapplicable and the taxpayer's quarterly factor be considered wrong, still the action of the Commissioner and the Tax Court was arbitrary and invalid within the rule of *Helvering v. Taylor*, 293 U. S. 507 and the case should be remanded to the Tax Court for further hearing with the burden of proof placed on the Commissioner. Of course *Helvering v. Taylor*, with which this Court is familiar, is not applicable here because the action of the Commissioner and the Tax Court was not arbitrary and invalid but based upon the settled practice in cases of this character. Moreover, even where a case is remanded for a new determination under the rule of the *Taylor* case, the Commissioner does not have the burden of proof with respect to that determination which is presumptively correct and the taxpayer has the burden of showing it to be wrong.

² See Treasury Regulations 80 (1937 ed.), Art. 10; Treasury Regulations 105, Sec. 81.10.

See also Gift Tax Regulations: Treasury Regulations 108, Sec. 819(f).

Cf. *Helvering v. Gowran*, 302 U. S. 238, 245-247; *Honmel v. Helvering*, 312 U. S. 552, 560. There is no merit to taxpayer's argument and it should be rejected by the Court.

In view of all the foregoing considerations, we submit that the decision of the Tax Court in the instant case was in accord with the law, sustained by the evidence and should therefore be permitted to stand.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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ELLIS N. SLACK,
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*Special Assistants to
the Attorney General.*

AUGUST, 1949.

APPENDIX

Internal Revenue Code:³

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(d) *Revocable Transfers*—

* * * * *

(2) *Transfers on or Prior to June 22, 1936.*—

To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.10. *Valuation of property.*—

* * * * *

(i) *Annuities, life, remainder, and reversionary interests.*—(1) If the executor adopts the option set forth in section 81.11, any annuity, life, re-

³ While the taxpayer now concedes taxability under Sec. 811(d) (2) of the Internal Revenue Code (Br. 3, Appendix to Br. p. 1) so there is no question before this Court with regard thereto, nevertheless it seems appropriate for us to set out these basic statutory provisions for the convenience of the Court in case it wishes to refer to them.

mainder, or reversionary interest includible in the gross estate should be valued as of the date of the decedent's death in accordance with the provisions of this section and then such value should be adjusted as explained in section 81.11 for any difference in value between the date of death and the applicable subsequent date due to causes other than mere lapse of time. If the executor does not adopt the option set forth in section 81.11, the value of any such interest should be computed as herein after prescribed without such further adjustment for any decrease or increase in the value of the property subsequent to the date of death.

(2) The value of an annuity contract issued by a company regularly engaged in the selling of contracts of that character is established through the sale by that company of comparable contracts.

(3) All other future payments are to be discounted upon the basis of compound interest at the rate of 4 per cent a year. If the time of payment or of payments is dependent upon the continuation of or upon the termination of a life or of lives, the Actuaries' or Combined Experience Table of Mortality, as extended, and established actuarial principles are to be used in the computation of the present worth. For the purpose of the computation the age of a person is to be taken as the age of that person at his nearest birthday. Table A, a part of this section, gives factors applicable to a case in which only one life is involved. (See paragraphs (4) to (8), inclusive.) Table B, a part of this section, gives factors applicable to a case in which only a term-certain is involved. (See paragraphs (9) to (11), inclusive.) If the time of payment or of payments is dependent upon the continuation of, or termination of more than one life, or there is a term-certain concurrent with one or more lives, a special computation in accordance with the first two sentences of this paragraph is necessary. A case requiring a special computation may be stated to the Commissioner who will fur

nish the applicable factor, provided such request is made sufficiently in advance of the due date of the return. Such request must fully disclose all relevant facts. The date of birth of each person, the duration of whose life may affect the value of the interest, should be established by affidavit.

(4) If the decedent had a remainder interest in property subject to the life estate of another, the present worth of the remainder interest at the time of death should be obtained by multiplying the value of the property at the time of death by the figure in column 3 of Table A opposite the number of years nearest to the actual age of the life tenant.

Example. The decedent was entitled to receive property worth \$50,000 upon the death of his elder brother, to whom the income for life had been bequeathed. The brother at the time of the decedent's death was 31 years 5 months old. By reference to Table A, it is found that the figure in column 3, opposite 31 years, is 0.31262. The present worth of the remainder interest at the date of death is, therefore, \$15,631 (\$50,000 multiplied by 0.31262).

(5) In case the decedent was entitled to receive an annuity of a definite amount during the lifetime of another person, payable at the end of annual periods, the present worth at the time of the decedent's death must be computed upon the basis of the value of a life annuity at the age of the other person. The amount payable annually should be multiplied by the figure in column 2 of Table A opposite the number of years in column 1 nearest to the actual age of the other person.

Example. The decedent received under the terms of his father's will an annuity of \$10,000 for the life of his elder brother. The brother at the decedent's death was 40 years 8 months old. By reference to Table A, the figure in column 2 opposite 41 years, the number nearest to the brother's actual age, is found to be 14,86102. The present worth of the annuity at the date of the decedent's death is, therefore, \$148,610.20.

(6) In the case of an annuity under which the decedent was entitled to receive during the life of another person payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the figure in Column 2 of Table A opposite the number of years in column 1 nearest the actual age of the person whose life measures the duration of the annuity and then multiplying the product by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments.

Example. If, in the example given in paragraph (5), the annuity is payable in semiannual installments of \$5,000 at the end of each semiannual period, the aggregate annual amount, \$10,000, should be multiplied by the factor 14.86102, and the product should be multiplied by 1.00990. The present worth of the annuity at the date of death is, therefore, \$150,081.44 ($\$10,000 \times 14.86102 \times 1.00990$).

(7) If the first payment of an annuity for the life of an individual is to be paid at once, the value of the annuity is the sum of the first payment plus the present worth of a similar annuity, the first payment of which is not to be made until the end of the first period.

Example. The decedent was entitled to receive an annuity of \$50 a month payable during the life of another person. The decedent died on the day a payment was due. At the date of the decedent's death the person whose life measures the duration of the annuity was 50 years of age. The value of the annuity at the date of decedent's death is \$50 plus the product of $\$50 \times 12 \times 12.47032$ (see Table A) $\times 1.01820$ (see preceding paragraph (6)), or \$7,668.38 [$\50 plus $(\$50 \times 12 \times 12.47032 \times 1.01820)$].

(8) If the decedent was entitled to receive the entire income of certain property during the life of another person, or was entitled to the use of non-income-producing property during the life of another person, a hypothetical annuity at a rate of

4 per cent of the value of the property should be made the basis of the calculation. A provision for the payment of income in semiannual, quarterly, or monthly installments does not affect the value to be assigned to the life interest.

Example. The decedent was entitled to receive the income from a fund of \$100,000 during the life of a person 41 years old. The value of a hypothetical annuity of \$4,000, dependent upon the life of such a person, is indicated by the table to be \$59,444.08 (\$4,000 multiplied by 14.86102).

(9) If the decedent was entitled to receive property at the end of a specified number of years, Table B or an extension thereof should be used.

Example. The decedent, who was entitled to receive \$100,000 at a certain date, died 30 years prior to such date. The value of his right is the product of \$100,000 multiplied by 0.308319, the factor in column 3, Table B, opposite 30 years in column 1.

(10) In the case of an annuity under which the decedent was entitled during a term-certain to receive payments at the end of each semiannual, quarterly, or monthly period, the value of the annuity is to be determined by multiplying the aggregate amount to be paid within a year by the applicable factor in column 2 of Table B and the product is to be multiplied by 1.01820 for monthly payments, by 1.01488 for quarterly payments, or by 1.00990 for semiannual payments.

Example. The decedent was an annuitant for a term-certain, being entitled to \$1,000 annually payable in installments of \$500 at the end of each semiannual period. A semiannual payment of \$500 had been made just before the death of the decedent and there remained 20 payments to be made over a period of 10 years. The value of the annuity as of the date of the decedent's death is the product of \$500 x 2 x 8.11089 (see Table B) x 1.00990, or \$8,191.19.

(11) If the first payment of an annuity for a definite number of years is to be paid at once, the applicable factor is the product of the factor shown

in Table B multiplied by 1.02154 for monthly payments, by 1.02488 for quarterly payments, by 1.02990 for semiannual payments, or by 1.04 for annual payments.

Example. The decedent was the beneficiary of an annuity of \$50 a month. On the day a payment was due, the decedent died. There were 300 payments to be made, including the payment due. The value of the annuity as of the date of decedent's death is the product of $\$50 \times 12 \times 15.62208$ (see Table B) $\times 1.02154$, or \$9,575.15 ($\$50 \times 12 \times 15.62208 \times 1.02154$).

Table A and table B omitted; they are set out in the Appendix to the taxpayer's brief.

No. 12,228

IN THE
United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Reply Brief for Petitioner

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The Commissioner's Regulations with Regard to the Actuaries' or Combined Experience Table of Mortality and the Quarterly Factor Do Not Have the Force and Effect of Law. The Question Is One of Evidence and in View of the Uncontradicted Evidence, the Tax Court Erred in Failing to Value the Life Estate of Estelle W. Koshland on the Basis of the 1937 Standard Annuity Mortality Table and in Failing to Find That the Factor for Quarterly Payments Was .375 to Be Added to the Factor for Annual Payments.....	2
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IN THE
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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Reply Brief for Petitioner

This case, as previously stated (Pet. Opng. Br. 2-5), is a federal estate tax case involving the questions of the proper mortality table and the proper quarterly factor to be used in valuing a life estate. Petitioner wishes to point out that this is the first case in which either of these questions has been presented to any United States Court of Appeals.

THE COMMISSIONER'S REGULATIONS WITH REGARD TO THE ACTUARIES' OR COMBINED EXPERIENCE TABLE OF MORTALITY AND THE QUARTERLY FACTOR DO NOT HAVE THE FORCE AND EFFECT OF LAW. THE QUESTION IS ONE OF EVIDENCE AND IN VIEW OF THE UNCONTRADICTED EVIDENCE, THE TAX COURT ERRED IN FAILING TO VALUE THE LIFE ESTATE OF ESTELLE W. KOSHLAND ON THE BASIS OF THE 1937 STANDARD ANNUITY MORTALITY TABLE AND IN FAILING TO FIND THAT THE FACTOR FOR QUARTERLY PAYMENTS WAS .375 TO BE ADDED TO THE FACTOR FOR ANNUAL PAYMENTS.

1. The Commissioner's Regulations with Regard to the Actuaries' or Combined Experience Table of Mortality and the Quarterly Factor Do Not Have the Force and Effect of Law.

The respondent's whole case is based on the contention that "Having stood for so long in the regulations this mortality table [the Actuaries' or Combined Experience Mortality Table] would seem to have attained a dignity and force akin to that of law." (Resp. Br. 12).

The respondent's contention is not sound. The Tax Court itself in the instant case treated the question as to what mortality table should be used as a question of procedure to be decided upon the evidence. Petitioner submits that the Tax Court erred in ignoring the uncontradicted evidence and in failing to find therefrom that the 1937 Standard Annuity Mortality Table should have been used. The Tax Court in its opinion in no way intimated, however, that the use of the Actuaries' or Combined Experience Mortality Table was required as a matter of law or that its presence in the regulations gave it "a dignity and force akin to that of law."

In none of the other Tax Court decisions on the point which the respondent cites on page 8 of his brief, did the

Court indicate that it considered the question as one of law. It expressly treated the question as one to be decided upon the evidence in each of these cases.

As pointed out on page 8 of petitioner's opening brief, the Tax Court in the cases of *Estate of John Halliday Denbigh* (1946) 7 T.C. 387 and *Nellie H. Jennings Est.* (1948) 10 T.C. 323 has refused to apply standard mortality tables where the evidence indicated that the person whose life expectancy was in question would not live for as long a period as the life expectancy assumed for his age in such tables. In the *Denbigh* case, the Court said " * * * such tables are evidentiary only and they need not be controlling." If as the respondent contends, the Commissioner's mortality table had to be used as a matter of law because it had been retained in the regulations for many years, then it would have been immaterial in the *Jennings* and *Denbigh* cases whether or not on the evidence the respective decedents could not live out their life expectancies. Valuation of their life estates in each of these cases would, as a matter of law, have had to be made upon the basis of the expectancies stated in the Commissioner's table.

The Court of Claims in the case of *Hanley, Administrator v. United States* (1945), 63 Fed. Supp. 73, which is discussed on pages 7 and 8 of petitioner's opening brief likewise indicated that the question was one of evidence and that if the regulations were held to require the use of the Commissioner's table as a matter of law in all cases, they would not be valid.

The *Hanley* case is a square decision that the question is as to the applicability of Table A (and of the Actuaries'

or Combined Experience Mortality Table on which it based) is one of evidence and that, if the regulations were construed to require their use as a matter of law, they would be invalid.

The respondent in his brief attempts to distinguish the *Hanley* case upon the ground that in that case the interest factor was involved, whereas in the instant case the mortality factor and not the interest factor is at issue. This distinction is obviously untenable. The interest factor forms as integral a part of Table A as the mortality factor, and if, as respondent contends, the incorporation of the table in the regulations gives it the force and effect of law, it must do so with regard to the interest factor as well as with regard to the mortality factor.

The respondent's brief does not expressly state that the force of law contention applies to his quarterly factor as well as to his mortality table. Since, however, the respondent's regulation with regard to the quarterly factor has been in the regulations for many years also, his argument is equally applicable thereto. The respondent is thus forced into the position of contending that the mathematical error which the Commissioner made in holding that his quarterly factor is applicable where a life estate is involved has the force of law (see Pet. Opng. Br. 35-36).

The cases which respondent cites on page 12 of his brief do not support him. They are all cases where regulations were involved which dealt essentially with questions of law and not with questions of fact. Neither these cases nor any other cases hold that a regulation which states a presumption as to facts, as for example on a question of valuation, is to be followed where on the evidence it is

shown to be erroneous as applied to the specific case at hand. If the issue in the instant case were whether mortality tables could be used in the valuation of a life estate, then a regulation indicating that they should be used could be held to have the force and effect of law. The issue in the case of *Simpson v. United States* (1920) 252 U.S. 547 was whether mortality tables could be used in the valuation of life estates. In the words of the Court in that case, "The objection [of the taxpayer] is not to the particular table that was used but to the use of any such table at all—to the method."*

There is no such objection, however, in the instant case. The petitioner does not challenge the use of mortality tables. The petitioner contends that on the uncontradicted evidence in this case, the proper mortality table to use is not the obsolete and outmoded Actuaries' or Combined Experience Table of Mortality, but the 1937 Standard Annuity Mortality Table. The objection here is not to the method, but to the table used. Such a question is one of evidence. The inclusion in the regulations of Table A based on the Actuaries' or Combined Experience Table of Mortality may raise a presumption of its correctness like the general presumption of correctness of the Commissioner's determinations, but it does no more. It does not

*The table in that case, like the table in the instant case, was based on the Actuaries' or Combined Experience Table of Mortality, but it must be remembered that that case involved a succession tax assessed under the Spanish War Revenue Act of June 3, 1898 (30 Stat. 448) and a decedent who died in June, 1899, some 45 years before the instant decedent. The uncontradicted evidence in the instant case is that the Actuaries' or Combined Experience Table of Mortality became obsolete prior to 1900 (R. 93, Pet. Opng. Brief 10).

make the use of Table A mandatory as a matter of law in cases where on the uncontradicted evidence its use is plainly erroneous.

This conclusion is buttressed by uniform decisions of the Courts in an analogous situation. For a while the Commissioner's regulations with regard to the valuation of securities contained the following provision: "The size of the gift of any security is not a relevant factor and will not be considered in such determination." (Gift Tax Regulations 79, Article 19 (1936 ed.)). The estate tax regulations, Regulations 80, Article 13, contained a similar provision.* The Courts uniformly refused to give these provisions any binding effect. Thus the Board of Tax Appeals in *Safe Deposit & Trust Co. of Baltimore, Executor* (1937) 35 B.T.A. 259 at 263, said:

"* * * 'Blockage' is not a law of economics, a principle of law, or a rule of evidence. If the value of a given number of shares is influenced by the size of the block, this is a matter of evidence and not of doctrinaire assumption * * * Whatever force the Commissioner's regulations (article 13) may have during the consideration of the matter in the stages before litigation in the Board or the courts, it can not lay down a controlling rule of evidence in such litigation." *Second National Bank of Philadelphia*, 33 B.T.A. 755.

This decision was affirmed in (C.A. 4, 1938) 95 Fed.(2d) 806. To the same effect are *Commissioner v. Shattuck* (C.A. 7, 1938) 97 Fed.(2d) 790, *Helvering v. Kimberly* (C.A. 7, 1938) 97 Fed.(2d) 433, and *John J. Newberry* (1939) :

*These provisions in both the estate and gift tax regulations were deleted by the Commissioner in 1939.

B.T.A. 1123. See also *Groff, Exr. v. Munford, Admr. (Smith Est.)* (C.A. 2, 1945), 150 Fed.(2d) 825; *Helvering v. Maytag, Exr.* (C.A. 8, 1942), 125 Fed.(2d) 55, cert. den. 316 U.S. 689, and *Estate of Leonard B. McKitterick* (1940), 42 B.T.A. 130, petition for review dismissed (C.A. 2, June 27, 1942).

The respondent on page 11 of his brief cites *Ithaca Trust Co. v. United States* (1929), 279 U.S. 151 and certain other cases. None of these cases involve any question as to what mortality table should be used and they are not in point. In fact, the Board of Tax Appeals in one of these cases, *Fidelity-Philadelphia Trust Co.* (1933), 27 B.T.A. 972 at 980, said "It is not a question of law as to what the life expectancy of a person is, whether that person be an individual alone or the survivor of a group of individuals."

The Tax Court Erred in View of the Uncontradicted Evidence in Failing to Value the Life Estate of Estelle W. Koshland Upon the Basis of the 1937 Standard Annuity Mortality Table and in Failing to Find That the Factor for Quarterly Payments Was .375 to Be Added to the Factor for Annual Payments.

Apart from the comments above made on respondent's argument with regard to the regulation having the force and effect of law, little need be said in reply to his brief. Petitioner's brief carefully analyzed the evidence and demonstrated that upon the basis of the uncontradicted evidence with no evidence at all having been offered by the respondent, the Actuaries' or Combined Experience Table of Mortality is obsolete and the Commissioner's quarterly factor is erroneous and that the Tax Court erred in their use, and that the Tax Court further erred in failing to use

the 1937 Standard Annuity Mortality Table and the petitioner's quarterly factor.

The respondent's rather skimpy brief completely ignores petitioner's careful analysis of the evidence and, except for his argument as to the binding effect of the regulations, is in reality a rehash of the Tax Court's opinion.

The respondent's statement of facts commencing with the third paragraph on page 4 of his brief and going through the first paragraph on page 6 is taken verbatim but without quotation marks from the Tax Court's findings of fact on pages 45-47 of the record. In so doing, the respondent has repeated the errors which the Tax Court made in its findings. Petitioner has carefully analyzed the uncontradicted evidence in the record and has pointed out these errors on pages 8-24 and 29-40 of its opening brief.

These pages of petitioner's opening brief dispose also of respondent's arguments, other than his "force of law" argument which petitioner has answered above. The Tax Court's argument that petitioner's table "might be worthy of further consideration if our question were the cost of an annuity from a commercial insurance company," which respondent repeats on pages 9 and 10 of his brief, is considered in detail on pages 16-19 of petitioner's opening brief. As therein pointed out, the Tax Court's reasoning which the respondent adopts is not only in conflict with the uncontradicted evidence but is in conflict with the Tax Court's own findings of fact and with the Treasury Regulations.

The respondent states on pages 12 and 13 of his brief that it was brought out on cross-examination that the 1937 table is not in general use, being used by insurance com-

panies only for the computation of annuities and that it was further brought out on cross-examination that the table which is considered as reflecting general mortality experience is the Insurance Commissioner's 1941 Standard Ordinary Table. Both these statements, as pointed out on pages 8-24 of petitioner's opening brief, are in direct conflict with the record and the first statement is in addition in direct conflict with the Tax Court's own findings of fact. The Tax Court found, as indicated in petitioner's opening brief at page 19, that "The 1937 Standard Annuity Table has been used * * * by actuaries as a basis for determining * * * life estates since 1937." (R. 46). The uncontradicted evidence in the record is that the 1937 Table is the most current standard table that would reflect the life expectancy of a person at the date of Mr. Koshand's death in 1944 and at the date of the trial in 1948 (R. 101-102; Pet. Opng. Brief 14).

The Tax Court found that the Insurance Commissioner's 1941 Standard Ordinary Table of Mortality is "considered as reflecting general mortality experience" but, as pointed out in petitioner's opening brief, particularly commencing at page 20, this finding is in direct conflict with the uncontradicted evidence, which is to the effect that the 1941 table is loaded and does not reflect general mortality experience, and that the table which does reflect general mortality experience and which actuaries and life insurance companies use to value life estates and annuities is the 1937 table.

Respondent, on page 13 of his brief, states that the 1937 table is confined to the experience of a select group. This is in conflict with the uncontradicted evidence that

the 1937 table is the table which would be used by all actuaries in valuing a life estate as of the date of Mr. Koshland's death (see Pet. Opng. Br. 13-15), and that experience has shown that actual longevity is in excess of the longevity shown by this table so that insurance companies, in using the table, have to assume a lesser age than the actual age of the person. In other words, the uncontradicted testimony is that the insurance companies in using the table add loading to it. The loading, however, is not in the table but is added to it, whereas in the 1941 table, the loading is right in the table (see quotations from the record, Pet. Opng. Br. 13-23).

Respondent's contention that the 1937 table is confined to the experience of a select group is in conflict also with specific evidence in the record to the effect that the 1937 table is used by insurance companies not only in cases where a person is buying an annuity from a company but also in cases where an insured dies and provides that the proceeds of his policy shall be paid to the beneficiary not in one lump sum but in periodic installments for life, and that even in such cases actual experience has shown that the life expectancy is in excess of that stated in the 1937 table.* The beneficiaries of life insurance proceeds to be

*Mr. Waites testified:

"Q. (By counsel for respondent) Now, Mr. Waites, isn't it a fact that in compiling a table such as the 1937 Standard Annuity Table the table is likewise weighted the other way in favor of the insurance company, and the life expectancy is given an outside limit so that the company would not be called upon to be paying annuities far beyond what the ordinary person might be expected—the life expectancy of the ordinary person. Do you understand my question?

A. Yes, I think I understand your question.

aid in installments upon the death of the insured are not select group in any sense. They are not selected either by themselves or by the insurance companies but they are simply the recipients in installments of insurance left by insured decedents.

Q. In other words, an annuity table, in order to prescribe a proper reserve for annuity purposes, you must be conservative and assume that the annuitants will outlive their life expectancy just as you testified that there is a tendency to be conservative in life insurance and assume that the man will die sooner. Isn't that a correct statement?

A. I think your question can be best answered in this manner: The nearest approach to the situation that we have on hand this morning is this: Where a man takes out insurance and provides that insurance will be payable to his wife, say, for example, in monthly installments, or periodic installments for life. Now then, in a case such as that the wife has no say in the selection of the annuity. Nevertheless, the experience under such annuities indicates that the 1937 Standard Annuity Table isn't conservative enough, they should be using it at least rated down one year, and practically all of the major insurance companies now under such annuities are rating that 1937 Standard Annuity down two years, because of the fact that their annuitants are living longer.

The Court: Rating it down? I should think——

The Witness: By 'rating it down' I mean if the individual's age is 64, they take the value shown as at age 62. It's really rating it down rather than rating it down.

The Court: I think Mr. Hurley's question was with regard to the actuarial data used by the insurance companies themselves. Isn't it true that in life insurance policies those tables always are conservative in estimating an earlier death than perhaps the actual experience would warrant, and in case of annuities don't those tables actually used by the insurance companies in figuring their premiums assume a later death than their experience actually warrants?

The Witness: Only if you are buying an annuity from the insurance company. Under the options that I have indicated here, you are not buying an annuity, it is just one method whereby the payments are distributed." (R. 122-123)

The respondent, on pages 10 and 13 of his brief, makes a point that mortality tables referred to in the evidence other than the Actuaries' or Combined Experience Mortality Table show a life expectancy less than that set forth in the 1937 Standard Annuity Mortality Table. As is pointed out in petitioner's opening brief, pages 10-12 and particularly at page 12, a number of mortality tables were introduced into evidence which were standard mortality tables as of the time that they were developed and which were in current use from time to time. They illustrate the fact that the expectancy of life has been constantly increasing. The uncontradicted testimony is that the older tables became obsolete as newer tables, based on more recent experience, were introduced (R. 80, 82, 84). The uncontradicted testimony further is that the table which "is the most current standard table that would reflect the expectancy" of a person at the time of Mr. Koshland's death and which is used by every actuary in valuing life estates as of that date is the 1937 Standard Annuity Mortality Table. The uncontradicted testimony as pointed out on page 15 of petitioner's opening brief is not, as the Tax Court found, that the 1937 Standard Annuity Mortality Table is "one of the most current tables" but is "*the* most current standard table."

Respondent's only argument with regard to the quarterly factor consists of a quotation of the single paragraph of the Tax Court's opinion on that issue, and then a further paragraph which in effect paraphrases what the Tax Court said in its opinion (Resp. Br. 14-15). Respondent apparently, being unable in any way to answer the petitioner's conclusive demonstration of the Tax Court's

error on the quarterly factor (Pet. Opng. Br. 29-40), has decided to ignore it. What has been said in petitioner's opening brief on the quarterly factor need not be repeated here.

Respondent attempts also to dismiss in rather cursory fashion petitioner's point that even assuming that the Tax Court did not err in failing to value the life estate upon the basis of the 1937 table and upon the basis of the petitioner's quarterly factor, it erred in view of the uncontradicted evidence in valuing said life estate upon the basis of the Actuaries' or Combined Experience Mortality Table and upon the basis of the respondent's quarterly factor, and in failing to find that the respondent's use of said table and said quarterly factor was arbitrary and invalid and in failing to place the burden of proof upon respondent with regard to the correct table and the correct quarterly factor.

As pointed out on pages 46-47 of petitioner's opening brief, if the petitioner had confined itself merely to introducing the uncontradicted evidence which is in the record on the Actuaries' or Combined Experience Table and the respondent's quarterly factor, then *Helvering v. Taylor* (1935), 293 U.S. 507 would require that the Tax Court's decision be reversed and the case remanded for further hearing. Out of an excess of caution, petitioner has argued the alternative the applicability of *Helvering v. Taylor*. Petitioner, however, has gone beyond merely exposing respondent's error and has introduced uncontradicted evidence establishing the applicability of the 1937 table and of petitioner's quarterly factor.

As pointed out in petitioner's opening brief, even consideration of the need for revenue cannot justify sustain-

ing the respondent in the instant case because the use of his mortality table and quarterly factor probably costs the Government more revenue than it gains. It may well be that an adverse decision in the instant case will force the respondent to abandon his reliance upon an outmoded mortality table and upon an erroneous quarterly factor. Be that as it may, on the basis of this record it is clear that the Tax Court erred in failing to value Mrs. Koshland's life estate upon the basis of the 1937 Standard Annuity Mortality Table and petitioner's quarterly factor, and it is respectfully submitted that this Court should not merely remand but should reverse the Tax Court with instructions to enter a decision in petitioner's favor upon the valuation issue.

Respectfully submitted,

SAMUEL TAYLOR

EDGAR SINTON

Counsel for Petitioner

Dated: September 9, 1949.

No. 12,228

IN THE
United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

SAMUEL TAYLOR,
EDGAR SINTON,

Counsel for Petitioner.

PAUL P. O'BRIEN, V.

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No. 12,228

IN THE
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For the Ninth Circuit

ESTATE OF ABRAHAM KOSHLAND, Deceased,
JESSE KOSHLAND, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

The court has granted until April 17, 1950 in which to
e this petition for rehearing.

GROUND FOR PETITION

The decision of this court was in error in failing to
mand the case to the Tax Court for further considera-
on. Such remand is required under the rule laid down in

Helvering v. Taylor (1935) 293 U.S. 507 and followed the cases cited on pages 42-43 of petitioner's opening brief. Even assuming that petitioner failed to establish the applicability of the 1937 Standard Annuity Mortality Table and of the petitioner's quarterly factor, nevertheless the uncontradicted evidence in this case established that the Commissioner's use of the Actuaries' or Combined Experience Mortality Table and of the Commissioner's quarterly factor was erroneous, or, in the words of *Helvering v. Taylor*, arbitrary and invalid.

ARGUMENT

Before this court, petitioner contended that the life estate of Estelle W. Koshland should be valued upon the basis of the 1937 Standard Annuity Mortality Table and upon the basis of petitioner's quarterly factor. This court in its decision sustained the refusal of the Tax Court to adopt this contention.

Petitioner further contended before this court that even assuming that the Tax Court did not err in failing to adopt the 1937 table and petitioner's quarterly factor, nevertheless it erred in valuing the life estate upon the basis of the Actuaries' or Combined Experience Mortality Table and upon the basis of the respondent's quarterly factor.

In this petition, petitioner requests this court to reconsider its decision upon the second point and to remand the case to the Tax Court for further hearing.

Assuming, as this court decided, that the uncontradicted evidence does not sustain petitioner's contention that the 1937 table and the petitioner's quarterly factor should be used, it clearly shows that the Actuaries' or Combined

perience Mortality Table is obsolete and that the respondent's quarterly factor is erroneous.

In addition to the evidence analyzed in detail in the petitioner's brief (particularly at pages 7-40 thereof which petitioner respectfully requests this court to re-examine) and in the petitioner's reply brief, the Treasury Department has, since this court rendered its decision in this case, itself recognized the obsolescence of the over-a-century-old Actuaries' or Combined Experience Mortality Table. The following correspondence is indicative of this fact.

Airmail

November 22, 1949

Vance Kirby, Esq.
Legislative Counsel
Treasury Department
Washington, D. C.

Dear Mr. Kirby:

Confirming our telephone conversation of this date, I would appreciate your advising me whether the Treasury Department has under consideration a proposed revision of section 81.10(i)(3) of the Estate Tax Regulations, Treasury Regulations 105. The section mentioned provides for the valuation of life estates upon the basis of the Actuaries' or Combined Experience Table of Mortality. It is my understanding that the Treasury Department has under serious consideration the substitution of a more modern table of mortality for the table used in the Regulations. Would you kindly advise me whether this understanding is correct and whether a recommendation for a change is likely to be made in the near future? A reply by airmail would be appreciated.

Sincerely yours,

/s/ Samuel Taylor

General Counsel
Treasury Department
Washington

November 30, 1949

Dear Mr. Taylor:

This is in reply to your letter of November 2, 1949 addressed to Mr. Kirby, in which you inquire whether the Treasury Department has under consideration a proposed revision of section 81.10(i)(3) of Treasury Regulations 105, which provides for the valuation of life, remainder, and reversionary interests upon the basis of the Actuaries' or Combined Experience Table of Mortality, as extended, and an interest rate of 4% a year.

The Department is considering the adoption of a more modern table of mortality for estate tax valuation purposes. Since the study of this and related problems, including the suitability of the 4% interest rate, has not been concluded, it is difficult to forecast when a change is likely to be made. It is probable that any change to be made will be prospective only and will in no way affect the estate tax liabilities of estates of decedents dying prior to the adoption of the new regulation. However, prior to the final adoption of a new regulation, public notice will be given in the Federal Register in order that interested persons may have an opportunity to submit their views and comments.

Sincerely yours,

/s/ Thomas J. Lynch
General Counsel

Samuel Taylor, Esquire
1211 Balfour Building
San Francisco 4, California

Whether the change which the Treasury will make in the regulations will be prospective only or will apply retroactively is not the significant point. The significant point is that the Actuaries' or Combined Experience Mortality Table is so obsolete that in the words of its General Counsel, "The Department is considering the adoption of a more modern table of mortality for estate tax valuation purposes." The uncontradicted evidence in this case shows that the Actuaries' or Combined Experience Mortality Table, first published in 1843, has been obsolete since at least 1900 (R. 93). The point, therefore, is that even assuming that petitioner has failed to establish the applicability of the 1937 table, it has nevertheless established the obsolescence and hence non-applicability of the 1843 table.

Likewise, assuming that the petitioner has failed to establish that its quarterly factor is the proper quarterly factor, it has established that the Commissioner's quarterly factor is erroneous. In this regard petitioner respectfully requests this court to examine again pages 29 to 40 of its opening brief.

Under these circumstances, the decision of the Tax Court should be reversed, and the case remanded for further proceedings. See *Helvering v. Taylor* (1935) 293 U.S. 507 and the Court of Appeals cases cited on pages 42 and 43 of the petitioner's opening brief. To the same effect, see also two decisions of Courts of Appeal which have been published since the decision of this court, namely, the decision of the Court of Appeals for the Second Circuit in *Wodehouse v. Commissioner* (November 2, 1949) 177 Fed.(2d) 881, and the decision of the Court

of Appeals for the Tenth Circuit in *The Federal National Bank of Shawnee, Oklahoma v. Commissioner* (February 13, 1950) Fed.(2d)

Upon a petition to review a decision of the Tax Court this court has the power under Internal Revenue Code Section 1141(c)(1) “* * * to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.” In determining what justice requires, this court should consider not only that the uncontradicted record in this case establishes the obsolescence of the respondent's 1843 mortality table and the erroneousness of his quartering factor, but that the Commissioner has now, by commencing consideration of the adoption of a more modern mortality table, himself recognized that the use of his table has been erroneous, or, in the words of *Helvering v. Taylor*, arbitrary and invalid.

Respectfully submitted,

SAMUEL TAYLOR,

EDGAR SINTON,

Counsel for Petitioner

Dated: April 12, 1950

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner hereby certify that in their judgment this petition for rehearing is well founded and that it is not interposed for delay.

SAMUEL TAYLOR,

EDGAR SINTON,

Counsel for Petitioner

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12229.

KAM KOON WAN, on His Own Behalf and on Behalf of All
Other Persons and Employees of Defendant, Who Are
Similarly Situated,
Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

BRIEF OF APPELLANTS.

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FILED

JUL 8 1949

PAUL P. O'BRIEN,
CLERK





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United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12229.

**KAM KOON WAN, on His Own Behalf and on Behalf of All
Other Persons and Employees of Defendant, Who Are
Similarly Situated,
Appellants,**

vs.

**E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.**

BRIEF OF APPELLANTS.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin, District Judge, presiding. The judgment was entered in an action for unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Par. 201 ff., and adjudged that certain of the appellants recover sums of money for unpaid overtime compensation and liquidated damages under the Act, and further adjudged that nothing was due others of the appellants, and allowed costs and attorneys' fees to the appellants. Judgment was filed on the 20th day of January, 1949.

The complaint alleged that appellants were employed by the appellee in a general construction business and were engaged in work necessary to interstate commerce

(R. 3), that the appellee for the six-year period prior to the commencement of the action employed the appellant for work weeks in excess of that provided for under the Fair Labor Standards Act without paying the appellant overtime compensation, as required by the Act (R. 4) that the District Court had jurisdiction conferred upon it under 28 U. S. C., Par. 41 (8) (Jud. Code, Par. 24) providing that the District Court shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce"; and that jurisdiction was also conferred upon the District Court by 29 U. S. C. Par. 216 (b) (R. 3). Section 16 (b) of the Act provides that:

"Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

Jurisdiction is conferred upon this court to review the judgment by Title 28, United States Code, Par. 129 which recites that:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, * * * except where a direct review may be had in the Supreme Court."

Under Title 28, United States Code, Par. 451, the term "Court of the United States" includes the District Court of the United States for the District of Hawaii.

The District Court ordered a partial summary judgment based upon Section 9 of the Portal-to-Portal Act of 1947 (29 U. S. C., Par. 258). The appellants contested the constitutionality of Section 9 of the Portal-to-Portal Act of 1947, and base their appeal to this court in part upon the constitutionality of said Act, as well as on the appropriateness of its application under the facts of this case. Section 9 of the Portal-to-Portal Act provides as follows:

“Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”

Jurisdiction of the District Court was alleged in Appellants' Complaint (R. 3) and was admitted in Appellee's answer, as amended (R. 8, 19, 31).

STATEMENT OF THE CASE.

The named plaintiff-appellant, hereinafter referred to as plaintiff, started action for himself and on behalf of all other persons and employees of the defendant-appellee, hereinafter referred to as defendant, who were similarly situated, to recover back wages for six years prior to November 14, 1945, together with the liquidated damages provided for under the Fair Labor Standards Act of 1938, 29 U. S. C., Par. 216 (b) (R. 2-7), hereinafter called the Act.

The complaint alleged that the defendant was engaged in a general construction business, having contracts with private individuals, the City and County of Honolulu, the Territory of Hawaii, and the United States Government, and that the plaintiffs were employed by the defendant and were engaged by it in work necessary to interstate commerce (R. 3).

The complaint further set forth that the defendant employed the plaintiffs for work weeks of longer hours than the regular work week, as established by the Act, without paying them overtime compensation, as required, for such hours (R. 4), and that the exact number of weeks, hours, wages and kinds of work performed by the plaintiffs were unknown to them, but were known by the defendant (R. 5). The prayer for relief asked for, among other things, judgment for unpaid overtime compensation and for an additional equal amount as liquidated damages (R. 5). The action was filed on November 14, 1945 (R. 7).

The defendant filed amended answers, in which it admitted that the plaintiffs were employed by the defendant during certain times within said period, but denied that any of the plaintiffs were employed in work necessary to interstate commerce, or within the coverage of the Act.

(R. 31, 32). Defendant admitted that certain of the plaintiffs worked in work weeks of longer hours than the regular work week, as established by the Act, but denied that it failed to pay the overtime compensation required by it (R. 32), and admitted that it had a record of the work, hours, wages and overtime paid to the plaintiffs (R. 33).

The answer set up the following specific defenses:

(1) the complaint failed to state a claim upon which relief could be granted (R. 33);

(2) none of the work performed by the plaintiffs was within the coverage of the Fair Labor Standards Act of 1938 (R. 33);

(3) after November 10, 1943, defendant paid time and one-half for all work in excess of forty hours per week to all of the plaintiffs who worked for it subsequent to that date (R. 33);

(4) Martial law was proclaimed throughout the Territory of Hawaii on December 7, 1941, by its Governor and continued until October 24, 1944; that during this period, the Territory was subject to military rule under orders issued by the Commanding General, as Military Governor, which orders fixed hours, wages and compensation, including overtime, which defendant was permitted to pay its employees; that the defendant, under compulsion, complied with the orders of the Military Governor relating to the hours and rates of pay paid to its employees during said period, and that such compliance constituted a good-faith reliance upon the orders of the Military Governor, so that plaintiffs are barred from bringing their action by Section 9 of the Portal-to-Portal Act, 1947 (29 U. S. C., Par. 258).

(5) that plaintiffs were barred from bringing their action by the territorial Statute of Limitations.

On a motion for summary judgment, the affidavits presented by the defendant in support of its motion recited that from December 7, 1941 to November 10, 1943, 80% of the total work done by the defendant was upon contracts with United States agencies (R. 25), and that after November 10, 1943, the defendant paid substantially all the plaintiffs at the rate of time and one-half for all work in excess of forty hours per week.

They averred that during the period of Martial Law from December 7, 1941 to October 24, 1944, defendant was in the category of a contractor and sub-contractor with the Federal Government and became subject to the orders of the Military Governor (R. 25); that such orders prescribed the hours and rates of pay for all employees, including the plaintiffs (R. 26); that the defendant paid compensation prescribed under compulsion of Military Orders in good faith reliance upon the Military Orders (R. 26), that the defendant was on a list of contractors who were doing work within the Territory of Hawaii, which list was prescribed by the Military Governor; that the defendant, as a contractor on such list, was obliged to obey the commands of the Military Governor with respect to the payment of wages, hourly rates and overtime, and the release or discharge of employees employed by it during said period, and that the defendant in good faith followed the Military Orders (R. 26).

The Military Governor had issued, among others, Military Order No. 38 (R. 59), whereby all employees of contractors such as the defendant were "frozen" to their jobs, their wages were "frozen", and their regular and overtime hours prescribed. General Orders No. 91 issued March 31, 1942, revoked General Orders No. 38, and established new policies concerning wages, hours of work, overtime and the use of labor (R. 62). It further contained the statement:

“Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act” (R. 62).

The order provided that the normal work week on war projects in the Territory of Hawaii shall be six days of eight hours each, and that time and one-half the regular rate would be paid for overtime in excess of forty-four hours, or in excess of eight hours in one day (R. 63).

There was no pleading or averment before the court on Motion for Summary Judgment that set forth that defendant made any inquiries of the Military Governor or any administrative agency as to whether he should comply with the military orders or the Fair Labor Standards Act.

The District Court took judicial notice of the Military Orders and the existence of Martial Law in the Territory of Hawaii (R. 36-39).

The clause “Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act”, did not appear in any of the other orders affecting labor, except Order No. 40 (New Series) (R. 37 Footnote), dated November 1, 1943.

The trial court ordered a partial summary judgment for the defendant against all the plaintiffs dismissing their claims for the period of November 10, 1943, to November 14, 1945, on the ground that all the plaintiffs were paid as required by the Act for that period, and further dismissing the claims for the period December 7, 1941, to November 10, 1943, on the ground that the defendant had established a good faith defense under Section 9 of the Portal-to-Portal Act. This left at issue the period from November 14, 1939, to December 7, 1941, as it applied to

the jobs performed by the defendant during that period (R. 87-88).

A Motion for Rehearing on the Ruling for Partial Summary Judgment was filed on March 11, 1948, which Motion for Rehearing was denied by the court (R. 68). Subsequently, a stipulation was entered into between the parties setting forth the nature of the work performed by the defendant's employees. The jobs covered under the Stipulation were segregated into three classes: I. Federal Government; II. Territorial Government; and III. Private Industry.

The terms of the stipulation are set forth at pages 69 to 76 of the record. In its ruling on the stipulation, the District Court held that the work performed by the defendant for the Federal Government, with exception of the Federal Building housing a Postoffice in Hilo, Hawaii, was not within the scope of the Fair Labor Standards Act, because it was work for the Government upon Military reservations, and was substantially all new construction; hence, it was not commerce or production of goods for commerce, as defined under the Act (R. 79).

Of the two remaining classes, the court ruled that certain of the jobs were not covered by the Act, because they were new construction and work for the government on Military reservations (R. 85, 86). Others were purely a local operation unrelated to commerce or the production of goods for commerce (R. 85, 86).

The balance of the projects were found to be covered by the Act and are not a subject of this appeal. At a hearing after the ruling on the jobs covered, pursuant to the stipulation, testimony by defendant was that defendant failed to pay overtime compensation as prescribed by the Act for the period November 14, 1939 to December 7, 1941

and the amounts of the claims of the plaintiffs were ascertained in relation to those jobs determined to be covered for this period (R. 108-115, Exhibit 1, A, B, C).

Judgment was filed January 20, 1949 (R. 95).

This appeal is taken from those determinations by the district court that the "defendant was not liable for work done subsequent to December 7, 1941, because defendant paid plaintiff(s) in good faith, and in conformity with and in reliance on the rulings of the Office of the Military Governor of the Territory of Hawaii, and that such payments were in fact made in good faith and in reliance on said rulings, regulations, and orders, and as a matter of law under Section 9 of the Portal-to-Portal Act constitute a defense to the claims of plaintiff(s) for the period December 7, 1941 to and including November 10, 1943" (R. 89-90).

Appeal is also taken from the determinations based upon stipulated facts that certain of the jobs performed between November 14, 1939 and December 7, 1941 were not in interstate commerce, and from that part of the judgment based upon said determinations (R. 89-90).

Notice of appeal from the final judgment entered in this case was filed by the plaintiffs on February 15, 1949 (R. 96).

SPECIFICATION OF ERRORS.

I. The court erred in granting in part the motion of defendant for summary judgment based on Section 9 of the Portal-to-Portal Act of 1947, 29 U. S. C., Par. 258, on its theory that the affidavits of the defendant were sufficient "proof" within the meaning of Section 9 of said Act.

II. The court erred in ruling that the defendant was bound on threat of force to obey General Order No. 91 issued by the Military Governor in March of 1942, in view of the fact that the Order itself specifically exempted those employments covered by the Fair Labor Standards Act.

III. The court erred in holding that alleged fear of military sanctions under the circumstances of this case constituted a good-faith defense under Section 9 of the Portal-to-Portal Act of 1947.

IV. The court erred in ruling that the order of the Military Governor was a "regulation, order, ruling, approval or interpretation" of any agency of the United States within the meaning of Section 9 of the Portal-to-Portal Act.

V. The court erred in ruling that Section 9 of the Portal-to-Portal Act of 1947, was constitutional, and that it did not deprive plaintiffs of property without due process of law.

VI. The court erred in ruling that certain of the work performed by the plaintiffs for the defendant before December 7, 1941, was not within the scope of the Fair Labor Standards Act (R. 79, 85, 86).

SUMMARY OF ARGUMENT.

The appellant employees have appealed from the judgment because of several substantial errors committed by the trial court in entering the judgment. In considering the appellant's claim under the Fair Labor Standards Act, it must be recognized that the nature of the claim is one of remedial action taken against the employer for his violation of the Fair Labor Standards Act.

The defense of good faith pleaded by the appellee arises under the Portal-to-Portal Act of 1947 and as such is equivalent to an exemption under the Fair Labor Standards Act. It is the well-settled rule that the remedial provisions of the Act are to be given a liberal interpretation, while the exemptions on the other hand are to be given a narrow construction and are restricted to those persons who come plainly and unmistakably within the terms and spirit of such exemption. It was not the intention of the Portal-to-Portal Act to repeal the remedial provisions of the Fair Labor Standards Act.

In considering whether or not the employer is to be excused from liability because of his failure to pay overtime compensation, as provided for under the Fair Labor Standards Act, the court must be satisfied that a defendant has "pleaded and proved" the same. An affidavit does not meet the requirement of proof.

The good faith of the employer can only be ascertained after the court has delved into all the facts and circumstances surrounding the good faith reliance. The burden of proof is placed specifically upon the employer. "Good faith" is measured by an objective test, namely, did the employer, in failing to pay the overtime compensation, act as a reasonable, prudent man would have acted under

the same or similar circumstances? "Good faith" also requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

In the case at bar, there is no objective action taken other than the so-called compliance with the order. Good faith cannot adequately be appraised on the basis of affidavits alone. It is an ultimate fact which is determined to exist or not after a full trial, examination of witnesses concerning notice of facts which would put the employer on inquiry, and the objective steps taken which a reasonable, prudent man would take under the circumstances.

The military order relied on by the employer was a basis for his good-faith defense, contained a phrase therein which should have put the employer on notice that he was to comply with the Fair Labor Standards Act, rather than with the body of the order. There was no attempt by the Military Governor to interpret the Fair Labor Standards Act as being applicable or inapplicable to the employer herein. As a matter of fact the military order shied away from the possibility of infringing on the scope of the Fair Labor Standards Act. But assuming that it did, the law is clear that the civil law must prevail when in conflict with the military rule. The whole purpose of the order was to maintain standards at the greatest level possible approaching the Fair Labor Standards Act and the Public Contracts Act, not to tear down those conditions.

The good-faith reliance claimed by the employer, here does not arise out of the usual situation, where the employer was in doubt about the applicability of the Fair Labor Standards Act, inquired of a governmental agency and was told that the Fair Labor Standards Act did not apply, but rather the good-faith reliance claimed by this

employer is one where he knew that he was covered by the Fair Labor Standards Act, but claimed that the military government required him to violate the civil law and comply with the military rule, despite the fact that he knew that he should have obeyed the Fair Labor Standards Act. The employer claimed that he had to obey the Military Governor, and such obedience to his order constituted a good-faith reliance within the meaning of Section 9 of the Portal-to-Portal Act.

The appellants maintain that payment to the employees in conformity with the military order was not such a good-faith reliance. The actual facts and circumstances belie any good faith. First, defendant failed to comply with the Fair Labor Standards Act during the period of November 14, 1939, to December 7, 1941. Secondly, the military order, upon which defendant claims to have relied, provided for the exception of the appellant employees from the ambit of the order. Third, on and after November 10, 1943, defendant complied with the Federal Law, despite the fact that the Military orders and the Martial Law continued until October 24, 1944. Fourth, appellee never made any inquiries as to whether or not he should comply with the military order or the Federal Law as a reasonable man would have done. The defendant had a remedy for any illegal action which the Military Governor might take under color of his order. The employer could resort to the Federal District Court for a Writ of Habeas Corpus where he would be saved from the military decree.

The order of the Military Governor is not an administrative one, but rather it is an executive order, pursuant to which administrative action is taken, nor was the order the kind contemplated by the Act, since the Military order does not embody in it the same concept as a regulation or interpretation which is made pursuant to a statute or

executive order, nor is the order that of an agency of the United States.

While the Portal-to-Portal Act does not define "agency", other definitions indicate that in order to have agency action, only action by top agency officials can be treated as agency action. Here in the chain of command, the Military Governor of Hawaii was far from the top level necessary to be an administrative agency. The Military Government of Hawaii was not an agency of the United States also for the reason that it represented a Territorial Government; it was military authority exercised in the field in time of war, and it was a function which expired at the termination of the war, all of which reasons exclude it from statutory definitions of the term.

The Portal-to-Portal Act of 1947 is unconstitutional because it violates the Fifth Amendment of the Constitution of the United States, in that it deprives workers of their vested rights, without due process of law. The rights granted by the Fair Labor Standards Act became vested in the worker immediately when he put in his time. The obligation of the statutory payments became fixed as of then, and when Congress enacted a law subsequent to the performance of work, which under certain circumstances did not require the employer to pay the overtime compensation provided for in the law, it deprived the worker of their vested rights. To permit Congress to enact such legislation retroactively would be to reward the employer who can hold out in the payment of his just debts until the law is changed, and to penalize the employer who pays his just debts.

Certain of the projects upon which the appellant worked during the period of 1939 to December 7, 1941, contrary to the trial court's holding, were covered by the

Fair Labor Standards Act, and the trial court should have so held. The fact that work is performed for the government on a cost-plus-fixed-fee-contract basis does not take the work out of interstate commerce. New construction of an instrumentality of commerce does constitute commerce within the meaning of the act.

The judgment of the court below, as herein indicated, is completely unsound in several respects and very weak in others. For these reasons it should be reversed.

ARGUMENT.

I.

A Motion for Summary Judgment Based on Section 9 of the Portal-to-Portal Act of 1947 Does Not Properly Lie Since Affidavits Are Not "Proof" Within the Meaning of That Section.

Under Section 9 of the Portal-to-Portal Act of 1947 (29 U. S. C., Par. 258), an employer may establish as a special defense to his failure to pay minimum wages or overtime compensation under the Fair Labor Standards Act, that his failure to pay was in good faith in conformity with and in reliance on an administrative regulation of a United States Agency. The pertinent language of that section is:

“* * * no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice of enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the action or proceeding * * *”

However, such a defense cannot be legally established by the method of a Motion for Summary Judgment.

A. The remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation while exemptions therefrom are to be narrowly construed.

Since the Fair Labor Standards Act was enacted in 1938, it has become the well-settled rule that the remedial provisions of the Act are to be given a liberal interpretation, so that the Act's words will accomplish the purpose at which the Act is aimed. **United States v. Rosenwasser**, 323 U. S. 360, 362, 363, 89 L. Ed. 304; **Brooklyn Savings Bank v. O'Neill**, 324 U. S. 697, 89 L. Ed. 1296; **Roland Electric Co. v. Walling**, 326 U. S. 657, 90 L. Ed. 383, 389.

On the other hand, exemptions from the Act are to be given a narrow construction, and are restricted to those persons who come "plainly and unmistakably within the terms and spirit" of such exemption. **Phillips v. Walling**, 324 U. S. 490, 493, 89 L. Ed. 1095, 1098, 1099; **Jackson v. Northwest Airlines**, 70 F. Supp. 501.

That Congress did not intend to repeal the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act is apparent from statements made by sponsors of the Portal Act, in both Houses of Congress. Statement of Senator Wiley, 93 Congressional Record, Part 4, Page 4270.

Judge Nordby, in **Jackson v. Northwest Airlines**, 76 F. Supp. 121, 125 said:

"At the outset, the relationship between the Fair Labor Standards Act and the Portal-to-Portal Act of 1947, and the effect of the Portal-to-Portal Act upon the Fair Labor Standards Act, must be determined and clearly understood. The Portal-to-Portal Act does not purport to amend or repeal any part of the Wage and Hour Act by its express terms. A reading of the Portal-to-Portal Act shows that it

supplements the Wage and Hour Act, and by its very nature and terms must be read as a part of it. In effect, although not in name, it is an amendment. It limits the Fair Labor Standards Act operation in some instances and changes its interpreted meaning by clarifying the Act's meaning in other instances. But, as pointed out by the Wage and Hour Administrator in his Interpretative Bulletin issued in November, 1947, the Portal-to-Portal Act nowhere purports to change or restrict the purposes and objectives of the Fair Labor Standards Act. These purposes and objectives still remain. **29 Code of Regulations, Chapter V, Part 790, Section 790.2.** Consequently, Sections 9 and 11, like the remainder of the Portal-to-Portal Act, must be interpreted and applied with that fact in mind and with a view to effectuating the purpose and intent of the Portal-to-Portal Act without destroying the objectives and purpose to which it subscribes."

These rules of strict construction are applicable to the special defense provided for in Section 9 of the Portal-to-Portal Act, which results in an exemption from liability under the Fair Labor Standards Act. Senator Cooper of Kentucky, a member of the Senate Sub-Committee and Conference Committee, in the Senate debate on the good faith defense of Section 9, said (93 Cong. Rec. 4451, May 2, 1947).

"It is my personal opinion that a court should interpret this section strictly. The burden of proof is placed upon the employer. I believe that the courts should require proof of reliance and proof of good faith" (App. A).

The term "plead and prove" of Section 9, therefore, should be strictly construed also, and the defense should

not be deemed as proved upon the mere filing of an affidavit.

B. Under the Portal-to-Portal Act good faith can only be ascertained from all the evidence and circumstances.

To appraise good faith, under a given set of circumstances, there must be a probing by the court into the complete factual picture. This cannot be done by simple affidavit, even though it go undenied. Proof, real and substantial, must be adduced going to the crux of the "good faith." Conduct of the defendant in relation to the order, matters which would put him on notice, demeanor of witnesses, all go to the matter of proving the good faith. As was said in **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, at page 125:

"Section 9 requires by its specific terms that defendant must plead and prove that the omission to pay plaintiffs according to the Fair Labor Standards Act was (1) in good faith, (2) in conformity with and (3) in reliance upon, (4) any administrative regulation, order, ruling, approval or interpretation of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to class of employers to which he belonged. Thus, the burden of proof is placed specifically upon defendant, and that burden must be sustained by defendant with respect to each of the four requirements."

Burke v. Mesta Machine Co., 79 F. Supp. 588; **Ferrer v. Waterman Steamship Corp.**, decided May 9, 1949, 8 W. H. Cases 773, 16 Labor Cases, Pars. 65, 130.

The trial court quoted approvingly from the interpretation of November 18, 1947, by the Administrator of the

Wage and Hour Division, Section 790.15, 12 F. R. 7662, in which the Administrator states that,

“One of the most important requirements of Sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer’s ‘good faith’ is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that ‘good faith’ also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances. ‘Good faith’ requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.”¹

This statement of good faith has also been adopted by the courts in the cases of **Burke v. Mesta Machine Co.**, supra, and **Ferrer v. Waterman Steamship Corp.**, supra.

But the trial court in discussing this test (R. 46-47) failed to apply the objective criterion. The court below relied upon the subjective representation that the defendant had honest intentions. The only objective matter in the record on motion for summary judgment is a statement that the defendant complied with the Military order

¹ “We consider that the rulings, interpretations and opinions of the Administrator under this Act (FLSA), while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” **Skidmore v. Swift & Co.**, 323 U. S. 134, at 140, 89 L. Ed. 124, at 129.

(R. 26). There is nothing objective in the record presented to the trial court to support the proposition that the employer, in failing to pay overtime compensation, and in relying upon the regulation and orders of the Military Governor, did what a reasonable, prudent man would have done under the same or similar circumstances. There is no showing of any investigation or inquiry concerning the applicability of the body of General Orders No. 91 to this employer. There is no showing of the mechanics of how the order was relayed to employees involved in making up payrolls, what instructions they were given, whether or not there was a change in payment of overtime as a result of the order. The presence or absence of these matters would have to be considered on the question of good faith.²

This court has held that it is not proper to order a Summary Judgment in favor of the person setting up a defense, when such a defense is supported only by pleadings and affidavits and the statute requires that the matter be proved. **United States v. Lindholm**, 79 F. (2d) 784 (CCA 9) (1935). That case involved a suit against the United States for disability payments under a war-risk insurance policy. The United States filed answer in the form of a general denial. The plaintiff moved for Summary Judgment and filed affidavits in compliance with the statute of the State of California. The Government failed to file counter-affidavits, and the trial court struck the answer and gave Summary Judgment for plaintiffs. The Government appealed. The Tucker Act, 24 Stat. 506, 28 U. S. C. A., Par. 763, which applied to suits to recover

² Appellee referred to a message from the Wage and Hour Administrator to a Wage and Hour Agent in Hawaii in one of its affidavits (R. 29). But the trial court did not base its decision on the communication from the Administrator, since the defendant made no claim that it relied upon the radiogram: "The reason for the inclusion in the attorney's affidavit of this interesting but nonusable fact is, therefore, not apparent" (R. 41-42).

debts under World War Veterans Legislation, and under which the suit was brought, provided as follows:

“Should the District Attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules, as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, **unless he shall establish the same by proof satisfactory to the court.**” (Emphasis ours.)

This court stated that (P. 787),

“Even apart from the application of the rule requiring an interpretation of the statutes waiving the Sovereign’s immunity from suit strictly in favor of the Sovereign (citing cases), here is the clear repugnance between the two Acts. **Under the state statute (providing for summary judgment) the Federal Judge after a failure to file the defensive affidavits, finds himself debarred from proceeding with the case under any adopted rules and denied access to any satisfactory proof of the claim other than the affidavits, assuming the affidavits may be regarded as proof of the claim and in a manner preliminary to placing the defendant in default by the absence of the stricken answer.**” (Emphasis and explanation ours.)

This court held, that even in the face of such language in the statute, as, “Under such rules as the court may adopt in the premises”, affidavit proof was insufficient. See also **United States v. Stevenson**, 79 F. (2d) 788 (1935, CCA 9).

Today, Rule 56, FRCP, would not press the theory of judicial economy to the point where plaintiff’s cause of action is tried solely by the affidavit of the defendant.

Coming to the cases in which motions were made for summary judgments under Section 9 of the Portal-to-Portal Act in applying that section to claims under the Fair Labor Standards Act, it is significant to note that in all the cases we have been able to find which deal with such motions, excepting only the instant case, the motion for summary judgment was turned down by the trial court.

Divens v. Hazeltine Electronics Corp., 79 F. Supp. 513; **Camiano v. Rifkin**, 77 F. Supp. 363; **Halsband v. Fuller Co.**, 119 N. Y. L. J. 901 (1948); 14 Labor Cases, Par. 64,387; **Sheppard v. American Dredging Co.**, 77 F. Supp. 73 (1948).

In the **Divens** case, *supra*, the District Court said (P. 514):

“I think that this issue of good faith, depending, as it does, upon many factors, should be left to the determination of the trial court upon consideration of all the evidence adduced by both parties. Good faith cannot be established as a simple fact, such as a signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances. Only in rare situations can it be determined upon affidavits.”

And in the **Halsband** case, *supra*, the court went even further. It said,

“* * * acting in good faith and on reliance are hardly determinable on affidavits, replete though they are, by defendants and supplemented though they be by a wealth of exhibits lending apparent credence to defendants' contentions; but credibilities cannot be resolved in a motion under Rule 113, nor can the respectability of affiants be considered as contravening the plaintiff's allegations of a cause of

action under the Fair Wage and Hour Act and his averment in opposition to this motion; as on a trial the number of witnesses do not necessarily predominate, neither on a motion for summary judgment may the greater number of affidavits prevail over the one or few. In the Court's opinion the good faith and reliance are in the nature of mental abstractions and are matters of proof on the trial; this may impose an onerous burden on the defendants considering the volume of exhibits on this motion."

The court went on to say that for such determination it must necessarily await a trial, as a sound discretion cannot be based on affidavits to determine the good faith which is a condition precedent to be established by the defendant.

To emphasize the impropriety of ruling on "good faith" on a Motion for Summary Judgment, attention is called to the fact that on the final hearing when determination was made as to amounts owing the appellants for the period 1939 to December 7, 1941, the court adjudged that the appellee owed certain sums based on failure to comply with the overtime requirements. Surely violation of the Act during the period prior to the promulgation of the order would be a reflection on the employer's good faith reliance on the order and would be indicative of its continuing bad faith. This fact was not and could not be discovered, except on trial.

Placing the burden of pleading and proof on the employer would seem to be indicative of a continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the interests of employees. (For a discussion of proof of good faith in the Congressional debates as raised by the **Northwest Airlines** case, which was the subject of

much controversy in both the House and Senate, see Appendix A to this brief.)

Since the absence or presence of the good faith reliance on and conformance with the administrative rule, which is set up by the employer, is the ultimate fact to be determined by the court, this is a matter which should go to full trial so that the court may see and hear the witnesses and persons who relied upon the administrative ruling, and may appraise all the facts and circumstances surrounding the good faith reliance. Whether or not the employer did those things which a reasonable man would do under the same or similar circumstances can only be determined after a complete examination of the employer's witnesses. It cannot rest on the bald statement that "defendant was obliged under compulsion of Military order to pay the wages and overtime compensation prescribed in said Military order", and that the employer did pay compensation "in strict conformity with the Military orders" (R. 26).

The Trial Court's opinion refers to "no dispute at all concerning the facts", and to the further fact that the plaintiff did not file counter-affidavits (R. 44). To controvert the good faith of the employer, it was not necessary to file counter-affidavits or take issue with the actual facts that were evidentiary. The point is that, assuming the veracity of all the factual statements of defendant's affidavits there is not sufficient proof to make out a case of good faith reliance upon and conformity with an administrative regulation, etc. Whether or not the employer acted in good faith was the final fact to be determined by the court, and not something which could be established by affidavits.

II.

The Order of the Military Governor Did Not Compel the Defendant to Pay Compensation Prescribed in the Military Orders and Wage Schedules Issued Pursuant Thereto.

The trial court held that the defendant had “no freedom of choice” (R. 45), and that the defendant could only do what he was ordered to do. “The Constitution and Federal and Territorial Law was cast aside”, he said, “and the defendant and all other persons in Hawaii were told by military order, what to do, and theirs was not to question or to reason why.” The orders referred to by the court are General Orders No. 38, dated 20 December, 1941, and General Orders No. 91, dated 31 March, 1942, by the Military Governor (R. 59, 62).

Briefly, Order No. 38 “froze” all wage rates for employees on the Island of Oahu. Employees deriving support from Federal funds were “frozen” to the respective employers as of December 7, 1941, an eight-hour day was established with time and one-half to be paid in excess of eight hours and certain labor contracts were suspended (R. 59-60).

General Order No. 91 revoked Order No. 38 and set up, in lieu thereof, new policies governing wages, hours, overtime, and use of labor in the Territory of Hawaii (R. 62-66). Section 2 of said order contained this important clause:

“Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act.”

Here again a schedule of wages was established, hours of work, and a basis for overtime pay was laid down.

Federal, Territorial, and City and County of Honolulu Civil Service employees were exempt from the provisions pertaining to wages, and these same employees, in addition to supervisory employees of the contractors, were exempt from the provisions pertaining to hours of work and overtime.

It is submitted that the clause above quoted, commencing "nothing herein", clearly exempted the employees of the defendant from the general provisions of Order No. 91 when they worked on jobs to which the Fair Labor Standards Act applied. This saving clause excepted jobs covered by the Act from the ambit of the order, and puts employers on notice that the Wage and Hour Act was still supreme. The warning was placed at the beginning of the Order, so that all contractors who did work which was covered by the Fair Labor Standards Act, or the Public Contracts Act, need not comply with the body of the order, insofar as the hour standards as prescribed by the Act were greater than those under the order. If the operation was covered by the Wage and Hour Law, at the time of the promulgation of the order, that law could continue to control the activity. Otherwise, what would be the purpose of including this clause? If the Military Governor intended that all contractors should comply with the order, rather than the law, regardless of the activity engaged in, the order would specifically have so stated, or, at least, it would have remained silent on the relationship between the Act and the order, so that he could have compelled compliance with the order, even if the order were "probably unlawful" (R. 32).

But when he says, "Nothing herein shall be construed as superseding * * *," there can only be the conclusion that the intention is that the "laws shall alone govern" and that the order must yield.

Under any theory, the agency making the rule, regulation, order, approval or interpretation must be an agency which purports to rule or interpret the Fair Labor Standards Act, whether it be authorized so to do or not. The Military Governor did not attempt to do this. Where an order is issued, specifically excluding the Act from its scope, the interpretation of such an order should be that the provisions of the Act are unaffected and not the reverse.

Any position that the Military Governor attempted to interpret the Fair Labor Standards Act by the "Nothing herein * * *" clause as being inapplicable to contractors like the defendant, is untenable. The wording of the order is too clear to leave room for such a strained construction. We believe that only the opposite conclusion is possible: that where the order and the law were in conflict the order specified that the law was to be maintained. This was not only desirable, but consistent with specific congressional policy, particularly since that policy did not limit the hours of labor but went only to methods of compensation for those hours.³

Before the war there was no limitation on the number of hours which could be worked, but as to work covered by

³ 29 U. S. C., Par. 202, sets forth the Congressional policy in the Fair Labor Standards Act:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce, or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce, and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce, and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is declared to be the policy of Sections 201-219 of this title through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." 52 Stat. 1060.

the Act, extra hours were made more burdensome for the employer by the overtime compensation provisions. It is a reasonable inference that the intention of General Orders No. 91 was to extend at least part of those burdens to employers on projects which did not involve interstate commerce. The purpose of the order was to prohibit the employers from taking advantage of the war emergency and to work their employees unlimited hours without one day of rest, ostensibly under duress of the war, and without adequate compensation. This is confirmed by Section 2 (2) of the order, which provides for overtime compensation and by Section 2 (3), which provides for one day of rest in every seven days.

With respect to the one day of rest in every seven days, and the maximum work week, those provisions were applicable to all employees in the territory, since they were in no way in conflict with the Fair Labor Standards Act, that Act being silent on maximum hours. The provisions relating to overtime, however, were in conflict with the Fair Labor Standards Act, and those provisions in the nature of additional benefits to employees not otherwise entitled to them under the Fair Labor Standards Act could properly apply only to those who were not covered by the Act.

Thus an examination of the order as a whole indicates that its purpose was to fix maximum limitations on hours of employment for all employees, and to improve wage conditions for those not already protected by the Act, rather than to undermine existing protections afforded by the Act.

It was the desire of the Government, military as well as civil, to encourage as full production as was possible without destruction of health, and at the same time to provide adequate compensation. There was no effort on the part of

the Government to be penurious. It encouraged employers to abide by the adopted standards, rather than violate them, and as an expression of such encouragement Orders No. 91 recognized the superior weight of the law and bowed to it.

That the civil law has superior weight and that the defendant was not bound on threat of force to obey the military order is demonstrated by the case of **Duncan v. Kahanamoku**, 327 U. S. 304, 322, 90 L. Ed. 688, 699, in which Justice Black, speaking for the court said:

“Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. **Ex parte Quirin**, 317 U. S. at 19. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country, and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the peoples throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See **Ex Parte Milligan**, 4 Wall. (U. S.) 2, 18 L. Ed. 281; **Chambers v. Florida**, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing. For, as this court has said

before: “* * * the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the republic who advocates the contrary. The established principle of every free people is, that the laws shall alone govern; and to it the military must always yield.’ **Dow v. Johnson**, 100 U. S. 158, 169, 25 L. Ed. 632, 636.”

The court below apparently gave no weight to the principle “that the laws shall alone govern; and to it the military must always yield,” and would, on the contrary, permit the defendant to ignore the law and disregard the policy of both the military and civil government under color of the body of the military order, ignoring the proviso, stating that it relied upon it in good faith and conformed therewith. That its action was not in good faith, we shall show later on in this brief. Orders No. 91 in reference to overtime matters sought to preserve minimum standards in those activities not covered by the Fair Labor Standards Act and it tried to assure to the individual one day of rest, except in the cases of emergencies, with the approval of the Chief of Military or Naval Service concerned (R. 63). In the face of such clear and unequivocal language, as is used in the saving clause, it would be a travesty to hold that the defendant was bound on threat of force to obey General Orders No. 91.

III.

Alleged Reliance on the Military Order Under the Circumstances of This Case Did Not Constitute a Good-Faith Defense Under Section 9 of the Portal-to-Portal Act of 1947.

The application of the good-faith defense of Section 9 of the Portal-to-Portal Act to the facts of the instant case is indeed a novel one. The court below put it as follows.

“Perhaps Congress in passing the Portal-to-Portal Act did not have its attention directed to the situation which developed in Hawaii due to power usurped and exercised by the Army during this period. But it does seem to me to be within the spirit of the legislation and to present a defense which in its nature is even stronger than the typical Section 9 defense” (R. 48).

In other words, it was not a situation wherein an administrative agency issued a regulation, rule, order, etc., and the employer relied thereon in good faith, but rather as the court stated, a situation wherein the employer was coerced in spite of the fact that he knew or should have known that the military order was contrary to the law. “The situation was one of military dictatorship and one did as ordered to do” (R. 45).

A. What constitutes good faith?

The Portal-to-Portal Act itself does not contain a definition of “good faith.” The absence of this definition gave a great deal of concern to Congress, as exhibited by the Congressional debates. Senator McGrath, in his statement on the Portal-to-Portal Act, in discussing the good-faith defense, in 93 Congressional Record, Part II, p. 2255, said:

“The phrase ‘good faith’ has been judicially defined in numerous instances. These definitions have varied from case to case. They are almost as varied as causes which give rise to portal-to-portal suits. In some decisions it has been held to denote honesty of purpose, the actual existing state of mind, without regard to what it should be from given standards of law and reason. In others, however, it has been defined as honesty of intention, and freedom of knowledge of circumstances which ought to put the defendant upon inquiry. This Bill gives not the slightest clue to which of these, or

the infinite number of other definitions, it refers. Evidence of lack of good faith is always difficult to secure, and is of doubtful probative weight, save in the most obvious situations.”

In **Burke v. Mesta Machine Co.**, supra, Judge Gourley for the Western District of Pennsylvania in a considered opinion concerning the good-faith defense, said:

“The test of good faith is an objective one, and not the actual state of mind of the employer * * *.

“ ‘Good faith’ cannot be established as a simple fact. It is an ultimate fact—a conclusion to be drawn from all the circumstances * * *. The defense of ‘good faith’ is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies **without notice that such interpretations were claimed to be erroneous or invalid.**” (Emphasis ours.)

In **Cochran v. Fox Chase Bank**, 209 Pa. 34, 58 A. 117, 118, the court stated:

“Good faith is defined to be honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry.” (Emphasis ours.)

In **Siano v. Helvering** (D. C. N. J.), 13 F. Supp. 776, 780, and in **Colket v. St. Louis Union Trust Co.** (C. C. A. 8), 52 F. (2d) 390, 391, this definition was arrived at

“ ‘Good faith’ requires an honest effort to ascertain the facts upon which exercise of power must rest, and an honest determination from such ascertained facts.”

The Administrator of the Wage and Hour Division in his interpretation of November 18, 1947, Section 790.15, **12 F. R. 7662**, incorporates the test of a reasonably prudent

man acting under the same or similar circumstances in his test of good faith. Whether there was good faith reliance upon the order of the Military Governor by the appellee must be determined in the light of these definitions.

B. Failure to pay by appellee was not in good faith and in reliance on orders of Military Governor.

The simple, abbreviated facts pertinent to whether or not the appellee omitted to pay overtime under the Fair Labor Standards Act in good-faith reliance and in conformity with the order of the Military Governor are these: From November 14, 1939 to December 7, 1941, the appellee employed workers, who were covered by the Fair Labor Standards Act because of the activities which they performed, and failed to pay them overtime compensation as prescribed by the Act (R. 114). Military orders were issued on December 7, 1941, and March 31, 1942, upon which appellee claims it relied in good faith, as a defense for not paying statutory overtime. The appellee did work on a cost-plus-a-fixed-fee basis (R. 116). Prior to December, 1942, the Wage and Hour Administrator had ruled that cost-plus-a-fixed-fee contractors were covered by the Fair Labor Standards Act.⁴

The clause "Nothing herein * * *" appeared only in General Orders No. 91 and No. 40 (New Series), dated November 1, 1943 (R. 37). On and after November 10, 1943, appellee complied with the requirements of the Fair Labor Standards Act (R. 42), although the Military Government and the orders issued by it obtained until October 24, 1944 when it was terminated by Presidential Proclamation No. 2627, 9 F. R. 12831 (R. 36). There is nothing in the record on Motion for Summary Judgment to indicate whether

⁴ *Glowienke v. Hawaiian Dredging Company*, Northern District of Illinois, Eastern Division, January 6, 1948, 14 Labor Cases, Paragraph 64,343, 7 W. H. Cases 637.

the employer made any inquiries of the Military Governor or any administrative agency for a ruling as to whether or not he should comply with the Military orders or the Fair Labor Standards Act.

In view of these facts, it cannot be said that the employer in good faith relied on and conformed with the orders of the Military Governor.

From a reading of the Statute, Congressional Reports and debate, it is apparent that Congress by the good-faith defense sought to protect the employer, who found himself in this dilemma: He had inquired of an administrative agency whether he was bound by the Wage and Hour Law. He was told that he was not, and subsequently, he discovered that his employees were covered by the Act. The theory of the defense was that if the employer had done whatever he could to find out what the law was as to him and his employees in reference to the Act, and he was told he was not under the Act, he then had an equitable defense.

Congressman Gwynne, Chairman of the House Subcommittee on the Portal-to-Portal Bill, described the good-faith defense on the floor of the House as follows (93 Congressional Record, Part II, P. 1941, February 27, 1947):

“* * * The net result has been that many small employers have gone to the persons responsible for enforcing the law, have gotten rulings, interpretive bulletins, and have relied on them, only to find that next year the ruling has been changed by the Administrator, or that a Court decision has changed it.

“Regardless of his good faith, the employer finds himself subject to suit, not just for the amount involved but for twice the amount involved, together with attorneys' fees and costs.”

And Congressman Walter said, **93 Congressional Record** Part IV, 4390:

“* * * The defense of good faith is intended to apply only where an employer innocently and to his detriment followed the law that was laid down to him by governmental agencies without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. * * *”

Congressman Keating in the Congressional discussion said:

“Where an employer has notice of the invalidity of a ruling, or where he has notice of conflicting rulings of different departments of the government the good-faith defense cannot be invoked.” **93 Congressional Record, Part IV, 4391.**

And Congressman MacKinnon, a member of the House Labor Committee, in presenting the conference report stated that an employer

“cannot be said to have relied in good faith when he picks one of the rulings on which to rely and, particularly, it seems to me, under the language of the bill, when he relies on the ruling that is most favorable to his, the employer’s interest.”

93 Cong. Record, Part IV, P. 4391, May 1, 1947.

The defense was not intended to protect the kind of situation we have here, where the employer for a period of years was violating the Act, and then attempted to seek the cover of an order claiming that the body thereof affected his employees, where the order itself provided that the Fair Labor Standards Act should supersede the

order, and the employer knew or should have known that the military order was invalid (R. 45, 48). With a history of previous violations, this can only be construed as a reliance on that part of the order which was "most favorable to his, the employer's interest." Of this kind of situation the court, in **Burke v. Mesta Machine Co.**, supra, said:

"No one in either House of Congress spoke with reference to an employer who sat back for years, while the Administrator issued comprehensive rulings and interpretations to the effect that practices in which the employer was engaging were illegal, and then seized upon an highly equivocal 'action' by a Wage and Hour inspector to relieve him of liability. The statute was not couched in terms applicable to such a case and was not intended to effect such a result."

Where a saving provision is included in the order, it militates even stronger against good faith because here was knowledge of fact, which ought to put a reasonable man on further inquiry. Failing to ask for a ruling, his good faith should be found wanting.

See **Bauler v. Pressed Steel Car Co.**, 81 F. Supp. 172, 176, wherein it was said:

"* * * I think that an employer, to come within the protection of an administrative approval or interpretation must have followed the familiar routine of submitting a particular problem to the head of the agency for a ruling or opinion. An opinion letter of the head of the agency or his counsel, ruling on the question, interpreting the section of the statute in question in the light of the facts of the employer's situation or approving the employer's interpretation of the law, would come within the meaning of this section. I thing nothing less will do."

Also **Burke v. Mesta Machine Co.**, supra; Interpretive Bulletin, dated November 18, 1947, Section 790.15 (c), and (d), **12 F. R. 7662**, and generally, **Hoffman v. Todd and Brown, Inc.**, 8 W. H. Cases 348; **Reid v. Day & Zimmerman**, 73 F. Supp. 892, affirmed 168 F. (2d) 356; **Kerew v. Emerson Radio Corp.**, 76 F. Supp. 197; **Central Missouri Telephone Co. v. Conwell**, 76 F. Supp. 398, affirmed in 170 F. (2d) 641; **Wolferman, Inc., v. Gustafson**, 169 F. (2d) 759.

The trial court rejected the proposition that the “Nothing herein * * *” phrase found in the general orders made it impossible to conform to and rely upon Military orders in good faith. The court said this may be so, but

“It is, however, of no significance, for as a matter of law, the defendant was charged with this notice anyway, and actually as an alert business entity must have known it was not paying and working its employees as directed to do by the Fair Labor Standards Act. The important fact is that the defendant presumably would have complied with the Act if it could have and did so as soon as it could, but until the Military Orders allowed, compliance was impossible.” (R. 48). (Emphasis ours.)

The argument that the “Nothing herein * * *” phrase was of no significance because the appellee was charged with notice as a matter of law anyway, is not a valid one. Actually, in all the good faith defense cases, the employee was charged with notice of the Fair Labor Standards Act as a matter of law, too, but it was because they relied upon a ruling of an Administrative Agency to the contrary and in good faith, that the court allowed such reliance as a defense. Here, there was no basis for reliance. The fact that the “Nothing herein * * *” phrase is included in

orders 91 and 40 (New Series), discounts among other reasons any good faith on the part of the employer.

The statement by the court below "that the defendant presumably would have complied with the Act if it could have, and did so as soon as it could," is contrary to the record. At that point of the proceedings, of course, it was not aware of the fact that the appellee had violated the law during the period when it could have complied with the Act, and, therefore, the court's statement that appellee would if it could was not altogether correct, because it could from 1939 to 1941, but did not. The facts concerning these violations were not proved until the final hearing.

The question of the good-faith reliance of the appellee upon the orders of the Military Governor is again raised by its course of conduct on and after November 10, 1943. It was agreed that from that date on the appellee paid all the appellants within the scope of the Act, in accordance with the Act's provisions (R. 42). General Order No. 40 (New Series) issued November 1, 1943, apparently was relied upon by the Trial Court as authority for compliance with the Act after November 10, 1943 (R. 39), but according to the Trial Court's opinion, the authority for compliance after November 10, 1943, was no different from the authority for compliance as of April 1, 1942 (Footnote 4, R. 37).

It is to be remembered that Military Government continued until October 24, 1944 (R. 36), so that it logically follows that if there was compulsion on April 1, 1942, the same sort of compulsion continued until October 24, 1944. If, as of November 10, 1943, appellee was no longer threatened by the compulsion of the orders, because of the "Nothing herein * * *" clause in Order No. 40 (New

Series), then it could not have been threatened as of 1 April, 1942, for the same reason. In other words, there couldn't have been good-faith reliance up to November 10, 1943, if the same practice of reliance did not continue for the life of the Military Orders. There is an obvious inconsistency in the position that the employer became subject to the orders of the Military Governor until October 24, 1944, and that during that period was obliged under compulsion to obey the Military order, when after November 10, 1943, it did not comply with the Military orders, although they were in substantially the same form as they were on March 31, 1942.

“Good faith” cannot be realistically argued here because appellee did not actually obey the Military order. Obedience to the order would require him to follow the provisions of the Fair Labor Standards Act, and so, therefore, by seeking to come under Section 2 (b) of General Orders No. 91, he actually violated that order. As far as this employer was concerned, the “Nothing herein * * *” clause negated a good-faith following of Section 2, and made the balance of the order non-existent. For this employer there was no threat of punishment held over his head for compliance with the Fair Labor Standards Act rather than the order, but actually a mandate to comply with the Act.

C. A coercive order complied with on a claimed threat of punishment, despite notice of violation of Fair Labor Standards Act is not a good-faith defense under Section 9

An employer is not coerced into compliance with a military order by threat of punishment when he knows or should know that he is violating the Act by such compliance, and he may not plead such order as a good faith defense under Section 9 of the Portal Act.

Again we submit that the rule of narrow construction must be applied. The trial court recognized that the order was the result of "power usurped," and that it was not entirely the kind of defense that "Congress had indicated it was willing to recognize and to be within the aim and spirit of Section 9 of the Portal-to-Portal Act" (R. 49). But, nevertheless, the trial court maintained that it presented a "far stronger defense." That this is not the kind of defense contemplated by Congress, there can be no question. But the trial court believed that the employer had no alternative. This is not entirely true. He need not comply.

In **Duncan v. Kahanamoku**, 327 U. S. 304, 90 L. Ed. 688, the defendants committed civilian offenses, and were tried by a Military tribunal. The order of the Governor had suspended the privilege of the Writ of Habeas Corpus (327 U. S. 348), but nevertheless, the defendants challenged the power of the Military Tribunals by petition for writs of habeas corpus filed in the District Court of Hawaii. The District Court held that the Military tribunals had no such power and ordered that the men be set free. This court reversed and ordered the petitioners returned to prison, 146 F. (2d) 576. The United States Supreme Court reversed, and sustained the District Court. Here was an individual who was given relief by the courts from military edict. Similarly, the appellee here did not have to comply with the military orders, and if, perchance, conviction by the military did occur, appellee would have had the same recourse as Duncan and could nevertheless resort to the courts.

As has been indicated from an analysis of the record, the employer's "good faith" is far from the simple assertion purportedly presented by its affidavits on Motion for Summary Judgment. The lack of a clear-cut directive in

the order relied upon by the employer, the failure to comply with the Act prior to the promulgation of the military orders, the failure to ask for a ruling on how the order affects the employees, the subsequent compliance in face of the military orders, all indicate that the appellee was trying to seek out the most favorable terms that it could interpret for itself. These matters are a far cry from the good-faith defense, as contemplated by Congress, and the conduct of this employer should not be permitted to thwart the remedial purposes of the Fair Labor Standards Act.

IV.

The Order of the Military Governor Was Not a Regulation, Order, Ruling, Approval, or Interpretation of Any Agency of the United States Within the Meaning of Section 9 of the Portal-to-Portal Act.

On analysis of the statutory language of Section 9, it will be seen that the order relied upon by the appellee does not come within that class of administrative regulations, orders, rulings, approvals or interpretations, nor is it an order of any agency of the United States, as contemplated by Congress.

A. The order is not an administrative one.

The order issued by the Military Government is not administrative in nature, but rather is executive in nature. There is no question of any ministerial functions performed by the Military Governor in the order. The order itself establishes the law and is substantive. It sets forth what rates of pay shall be paid, the hours to be worked, when overtime shall be paid, and the control of the labor force. There is not present here a regulation ancillary to an executive order or statute, nor is there a ruling, approval, or interpretation pursuant to such executive order.

or statute. The case of **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, points out the distinction between executive and administrative capacity. There the defendant entered into a contract with the United States to modify bombers. The contract was executed for the government by a contracting officer of the Army Air Corps. The court said,

“Thus, in that transaction, the Army Air Corps was not acting as an administrative agency. It was acting as a part of the executive branch of the government and in an executive, not in an administrative agency capacity” (p. 129).

The defendant there wrote to the Air Corps inquiring as to reimbursement in the event the Wage and Hour Act applied to its employees, and what the United States contemplated under the contract with respect to it. The court continued,

“That the Air Corps gave the reimbursement guaranty and the instructions to defendant in its executive capacity as the United States and not as an administrative agency of the United States, follows from the fact that it acted for the government in making the contract and also in assuming to bind the government to guaranties made under it or as a result of it” (p. 129).

The military government by its executive decree usurped a legislative function. It substituted its edicts for that which was the expression of Congress, the representatives of the people. The words “administrative regulation, etc.,” should be construed by the principle of *ejusdem generis*, denoting words in a series of the same kind (**Bauler v. Pressed Steel Car Co.**, *supra*). Applying this principle to the military order in question, it will readily be seen that the military order does not embody in it the

characteristic which is common to all the other words in the series, namely, that it be a ruling, or interpretation of a law or order as applied to a particular situation. The military order, having no meaning in common with the other terms in the series, should not be clothed with an administrative cloak, nor should it be held to be the kind of order meant by Congress as a basis for a valid defense.

B. The order was not that of an agency of the United States.

The term “agency” is not defined in the Portal-to-Portal Act. The Courts, however, have interpreted this term, as has the Wage and Hour Administrator. The Administrator’s interpretation appears in Section 790.19 of his Bulletin of November 18, 1947, at **12 F. R. 7665**. This discussion was embodied in the opinion of the court in **Jackson v. Northwest Airlines, Inc.**, 176 F. Supp. 121, 127.

The Administrator relies for his definition of the term “agency” on Section 10, wherein the Act

“expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved. Similarly, the definitions of ‘agency’ in other federal statutes indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the power to act for the government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the government establishment” (**12 F. R. 7665**).

Applying this definition to the facts of the instant case, it is submitted that the Military Governor of Hawaii was not the agency of the United States. Such agency was the United States Army, as represented by the Chief of Staff,

who is authorized to speak as the Army rather than for it. While a subordinate officer in the Army may issue orders, such an order would not be one in the same category as an administrative order, as contemplated by the Portal-to-Portal Act.

In referring to agency the court in the **Burke** case, *supra*, said (p. 609):

“The words of Section 9 further strengthen the conclusion drawn from the reports and debates that Congress was referring to rulings by authorized and responsible officials of the federal agencies, which could be termed rulings of the agency.”

Bauler v. Pressed Steel Car Co., *supra*.

The following colloquy on the floor of Congress corroborates that a ruling of an agency would have to be one that was authoritative:

“Mr. Celler: Does the gentleman think it fair to have the employer rely upon the administrative ruling or interpretation of law by anyone say, of the lesser echelons of the Wage and Hour Division, some insignificant servant or employee?”

“Mr. Walter: But the record discloses that the rulings are made by the Administrator—and this is Mr. Walling’s testimony—the rulings are either made by him or made by somebody to whom he had delegated the authority to make the rulings. **I cannot imagine the important queries we have in mind ever reaching the desk of anyone without the authority to act thereon.**” 93 **Congressional Record**, Part II, p. 1496, Feb. 27, 1947. (Emphasis ours.)

The rule that designated procedure be followed in order to constitute “agency” action requires that only action by

top agency officials be treated as agency action, because agencies with no authority to determine the coverage under the Fair Labor Standards Act have no procedural avenue for the resolution of such an issue, and so only the top agency officials can speak authoritatively.

The trial court stated that the term “agency of the United States” was intended to have a wide scope, and relied upon **29 U. S. C., Par. 251 (a) (9)**, as its authority. This section reads:

“The cost to the government of goods and services heretofore and hereafter purchased by its various **departments and agencies** would be unreasonably increased and the public treasury would be seriously affected by consequent increased cost of war contracts; * * *.” (Emphasis ours.)

Insofar as Finding 9 distinguishes between departments and agencies, it is difficult to perceive how the court could logically state that the term “agency” in Section 9 was broad enough to cover the term “department”, specifically the War Department. Further, the “wide scope” theory is inconsistent with the rules of construction, as hereinbefore indicated.

The courts have also relied upon other statutory definitions for the term “agency” as a guide for what the term meant in the Portal-to-Portal Act. The Wage and Hour Administrator in his November 18, 1947, Bulletin, Section 790.19, referred to definitions in other federal statutes too, including the Federal Register Act, **44 U. S. C., Par. 304**; Federal Reports Act, **5 U. S. C., Par. 139**; and Administrative Procedures Act, **5 U. S. C., Par. 1001**. And the following cases mention them: **Rogers Cartage Co. v. Reynolds**, 166 F. (2d) 317, 320; **Burke v. Mesta Machine Co.**, supra, and **Jackson v. Northwest Airlines, Inc.**, 76 F. Supp. 121, 127.

The Administrative Procedures Act was in force at the time of the drafting of the Portal-to-Portal Act. Its purpose was to achieve reasonable uniformity and fairness in administrative procedures. It provided the following definition of "agency" [Subsection (a)]:

" 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the Governments of the possessions, territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of Section 1002 of this Title, there shall be excluded from the operation of this chapter:

(1) agencies composed of representatives of the parties or of representatives of the organizations of the parties to the disputes determined by them;

(2) courts-martial and military commissions;

(3) military or naval authority exercised in the field in time of war or in occupied territory, or

(4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947 . . . "

The Governor of Hawaii, under Section 67 of the Hawaiian Organic Act, **31 Stat. 153, c. 339, 48 U. S. C., Par. 532**, was authorized to call upon the Commanders of the Military and Naval Forces of the United States, and to place the territory under Martial Law. This he did. Appellants submit that the Military Government was the alter ego of the regularly established Territorial Government, rather than an agency of the Federal Government, and since the Government of the Territory is excluded from the definition of "agency", the Military counter-part thereof would also be excluded.

This argument was rejected by the court below, the court saying that

“The Army with the emergency as the lever, persuaded the Governor of the Territory to declare Martial Law and to give to it powers, * * * and thereafter it enlarged the unlawful grant and set up an independent government, which all * * * were obliged to obey” (R. 49-50).

Assuming that the Military Government were not the alter ego of the Territorial Government, then surely it would come under Exception (3) or (4) of the definition of “agency” under the Administrative Procedures Act.

The court below claimed that the Army in Hawaii was not “in the field” or “in occupied territory”. But the record in the case of **Duncan v. Kahanamoku**, supra, indicates differently. See 90 L. Ed. 711, Testimony of Lt. General Robert C. Richardson, Jr., U. S. A., Commanding General of the Central Pacific Area.

“* * * Q. You would not call Hawaii a combat zone?

“A. Yes I would. * * *”

So that under three aspects of the Administrative Procedures Act, the Military Government was not an agency of the United States.

Since the Military order was not an administrative one and the Military Governor was not actually vested with final authority to speak as the War Department, and further, since the Military order was not that of an agency within the usual statutory definition, it appears that the statutory requirements of an administrative ruling by an agency of the United States have not been met.

V.

**Section 9 of the Portal-To-Portal Act of 1947 is Un-
constitutional Because it Violates the Fifth Amend-
ment of the United States Constitution.**

When Congress passed the Fair Labor Standards Act in 1938, it conferred certain rights on working men and imposed certain obligations on employers. Subsequent to the enactment of this law the courts interpreted it and these interpretations were automatically read into the law. Both, before and after such interpretations, judgments were entered and satisfied, and settlements of claims were made. Congress then enacted the Portal-to-Portal Act and redefined rights and duties of employees and employers so as to take away certain of the established rights and purported to make that definition applicable to claims and lawsuits already in existence. Whether Congress can do so, depends of course on the nature of the right that has been established.

**The Claims of the Appellants Were in Existence Before
Passage of the Portal-to-Portal Act and Are Vested
Rights Which May Not Be Divested by
Retroactive Legislation.**

The rights of the Fair Labor Standards Act became vested in the worker immediately as he put in his time. The employee did everything that was required of him to be done and performed his part of the bargain. All that remained was that the employer pay according to the terms of the Statute. This the employer failed to do, and the lawsuit is for money earned and due. Subsequent to the performance of the work, the law was enacted which sought to establish that good faith reliance on an administrative ruling, etc. would wipe out the claim of the

plaintiff where he had already performed work in reliance on the Fair Labor Standards Act. The Supreme Court of the United States has declared as follows on the proposition:

“When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the Statute does not affect it or an action for its enforcement. **It has become a vested right which stands independent of the Statute.**” **Pacific M. S. S. Company v. Joliffe**, 2 Wall. (U. S.) 450, 457, 17 L. Ed. 805 (Emphasis ours.)

In **Overnight Transportation Company v. Missell**, 310 U. S. 572, it was said that workers are assured additional pay to compensate them for the period of a work week beyond the hours fixed in the Act; the wages were specified in the Statute and could not be changed by contract. It was the contract that had to be changed.

And in **Brooklyn Savings Bank v. O'Neill**, *supra*, the court said that these were statutory rights which could not be waived.

In **Reid v. Solar Corp.**, 69 F. Supp. 626 (1946), we find this language in the opinion:

“An employee’s claim for overtime compensation and liquidated damages under the Fair Labor Standards Act obviously constitutes property of which an employee may not be deprived without due process of law.”

The rights with which we are here concerned therefore are not mere expectations of future benefit, but rights which arose and became vested immediately upon the employer’s failure to make wage payments in accordance

with the then statute. To hold otherwise would be to offer a plum to him who violates the letter and spirit of the existing law and can hold out in the payment of his just debts until the law is changed. As a corollary, if such legislation which seeks to affect vested rights retroactively is upheld, it would penalize the employer who sought to comply with the law and pay his just debts.

To deprive the employees of these rights, pursuant to the Portal-to-Portal Act, is in violation of the Fifth Amendment to the United States Constitution, in that it would deprive appellants of their vested rights without due process of law.

VI.

Work Performed by the Appellants Prior to December 7, 1941, Was Covered by the Fair Labor Standards Act.

Pursuant to a stipulation (R. 69), the work performed by the appellants during the period prior to December 7, 1941, was divided into three categories: work done for (1) the federal government, (2) territorial government, (3) private industry. The trial court held (R. 79) that the work performed for the federal government, with one exception, was not within the scope of the Fair Labor Standards Act for the reason that (1) it was work for the government upon a military reservation, and therefore, was not "commerce" or "production of goods for commerce"; (2) it was, with certain exceptions, all new construction.

As to the first point, it has been held that cost-plus-fixed-fee-contractors with the government engaged in war production are not agents of the government and do not share the government's sovereign immunities. **Alabama v. King and Boozer**, 314 U. S. 1; **Curry v. United States**, 344 U. S. 14.

The production for interstate commerce by or for the government is production for commerce within the meaning of the Act. **Umthum v. Day and Zimmerman**, 235 Ia. 293, 16 N. W. (2d) 258; **Timberlake v. Day and Zimmerman**, 49 F. Supp. 28. In **Bell v. Porter**, 159 F. (2d) 117, certiorari denied, 330 U. S. 813, the court said:

“The constitution confers upon Congress the power to regulate commerce among the several states. This power to regulate commerce is not confined to commercial or business transactions. From an early date, such commerce has been held to include the transportation of persons and property no less than the purchase, sale, and exchange of commodities, **United States v. Hill**, 248 U. S. 420, 423, and goods may move in commerce though they never enter the field of commercial competition.”

McLaughlin v. Todd & Brown, Inc., 7 W. H. Cases 1014. **Bauler v. Pressed Steel Car Co.**, 81 F. Supp. 172, 175.

As to the matter of new construction, it has been held that new construction of an instrumentality of commerce does constitute commerce within the meaning of the Act. See **Ritch v. Puget Sound Bridge and Dredging Co.** (CCA 9), 156 F. (2d) 334. Those projects which would be covered by the Fair Labor Standards Act under the ruling of the **Ritch** case, *supra*, would be (1) additions to the battery charging distribution system, Pearl Harbor Submarine Base, (2) servicing landing mat at Ewa, mooring mast area at Pearl Harbor, radio shelters (since radio facilities even aboard naval vessels transmit commercial messages on occasion and are in interstate commerce).

Under work done for the territorial government, the new territorial wharf at Port Allen, Kauai, would come under the Fair Labor Standards Act under the theory of the

Ritch case, *supra*, and **Walling v. Patton Tully Transportation Co.**, 134 F. (2d) 945.

Pertaining to the projects for private industry, appellants submit that the building of the new wharf for the Inter-Island Steam Navigation Co. is covered by the Act. Such a wharf would be an instrumentality of commerce and would be covered under the theory of **Walling v. McGrady Construction Co.**, 156 F. (2d) 932; **Overstreet v. North Shore Corp.**, 318 U. S. 125; and **Pedersen v. Fitzgerald Co.**, 318 U. S. 740. The erection of a new pier and shed, Pier 29 for the Inter-Island Steam Navigation Co. at Oahu (R. 83), would be covered under the Act for the same reasons. The same would apply to new sub-stations at Hickam Field for Mutual Telephone Co. Digging and filling trenches for Hawaiian Electric Co., Ltd., and for the Honolulu Gas Company would also be covered under the Act for the same reason, insofar as the electric power and gas would be used to produce goods for commerce. These facilities substantially are projects upon which neither the courts nor the Administrator have been too clear as to coverage. The opinion of this court is therefore sought to clarify the doubts in reference to these projects and to determine whether or not the Act is applicable to these activities.

CONCLUSION.

Appeal has been taken to this court because there has been presented to the courts a novel kind of "ruling" by the Military Governor as a defense under Section 9 of the Portal-to-Portal Act of 1947. In none of the cases coming before the courts, which have arisen in continental United States, could a situation, which is unique to Hawaii, occur. There is no question but that the situation described in the record, which was prevalent in the Hawaiian Islands

during the war years from Pearl Harbor Day on, was not within the Congressional contemplation when the Portal law was created. The lower court, in applying the good-faith defense to the instant case, makes that defense far reaching, and extends the Congressional intent beyond that contemplated.

Appellants submit that if this kind of interpretation is permitted to stand, it would mean that during time of war civil laws enacted for the benefit of the people could be wiped out by the pretext of a doubtful military order, the result of the judgment of one Military General.

Not only would such a decision adversely affect the claims of employees in the instant case, but those of all other employees who have filed similar claims for work performed on the Islands during the period of Martial Law.

The Fair Labor Standards Act, when it was enacted in 1938, was hailed throughout the length and breadth of the land as an emancipation of the working man and an elevation of his standard of living. To give the broad construction to the order, which has been held here applicable, would be to defeat completely the remedial purposes of the Fair Labor Standards Act, and render all the good work it has done in the intervening years a nullity. What the decision of the lower court does is to sanction a device for employers to avoid the intent of Congress.

Until the Congressional policy, as established by the Fair Labor Standards Act or the Portal-to-Portal Act, is changed its intention should be respected, and the requirements of the Fair Labor Standards Act remain the controlling law, otherwise we have the situation described in the **Kahanamoku** case of substituting a government by men for a government by law.

It is respectfully submitted for all the reasons stated herein that those parts of the judgment, from which appeal has been taken, are erroneous and should be reversed with costs to the appellants.

Respectfully submitted,

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APPENDIX A.

This colloquy between Senators Cooper, of Kentucky, a member of the Senate Sub-Committee and of the Conference Committee, Donnell of Missouri, Chairman of the Senate Sub-Committee, considering the bill, and Ferguson of Michigan ensued in response to the following problem, (the **Northwest Airlines** case) presented by Senator Thye of Minnesota: An employer under the rulings of the Wage and Hour Administrator believed himself to be subject to the Wage and Hour Act. Then an official of the Railway Labor Board ruled that the employer was not subject to the Wage and Hour Act. The employer acted in accordance with the latter ruling. In fact, the employer, secured indemnification on his government contract against an adverse judgment by the court. Is the defense available to the employer?

93 Congressional Record 4451, 4452, May 2, 1947.

“Mr. Cooper: It is my personal opinion that a court should interpret this section strictly. The burden of proof is placed upon the employer. I believe that the courts should require proof of reliance and proof of good faith. It is my opinion that in the case which the Senator has stated that is an arguable question. Personally, I think that if two situations were presented to an employer as they have been stated in the Senator’s question, where it was possible for an employer to rely upon the ruling of one agency or upon the ruling of another agency, the question would of course arise as to whether he had a right to rely upon a ruling of the Railway Labor Board.

“Secondly, the Senator has stated that in this instance the employer did rely upon the ruling of the Railway Labor Board and, as I believe, asked indemnification

from the Treasury. So it seems to me that the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him.

“As the senior Senator from Missouri (Donnell) said yesterday, and which I must repeat, in every case it is a question of fact for the determination of the court. It is my opinion that it should be interpreted strictly and that in a case where an employer chose a course which was to his own advantage it would be a question as to whether he acted in good faith.”

“Mr. Donnell: * * * It seems to me that it is a question of fact, under all the circumstances, a question to be decided by the court first, whether or not the employer has sustained the burden of proof by showing that he acted in good faith and in conformity with or in reliance on an administrative regulation, ruling, order, or interpretation. All the facts in the particular case must be taken into consideration.

* * * * *

“It seems to me that when the question is presented to the court, as the distinguished senator from Kentucky has so well stated, the court will have before it the fact that the burden of proof rests upon the employer; second, that every fact within the cognizance of the court, the evidence in the case, must be taken into consideration. Even the demeanor of the witnesses will be required to be taken into consideration in the matter; third, that the court in determining whether or not the employer was or should be considered to have been protected by the provisions of Section 9 which was approved yesterday, must find, 1st, that the employer has pleaded, and, second, that he has proved that the act or omission complained of was in good faith, in conformity with and in reliance on the ruling of the Railway Labor Board official to whom the Senator has referred.

“I do not think it is possible or advisable to attempt to say here that judgment should be rendered for the defendant. It is a question of fact to be determined by the court under all the facts of the case.”

* * * * *

“Ferguson: * * * is not the question of fact to be determined by a judicial body? If it were before a jury it would be submitted to the jury on a charge by the court concerning the doctrine of good faith, and if the jury found that the facts came within the rule of laws laid down it could determine that the party acted in good faith or not, as it might desire. It is one of those indefinite things about which it is always difficult to legislate. It is like the law on the question of negligence. In the law of negligence it has been impossible to lay down a specific and certain definition of negligence, so the law allows the question of fact to be presented as to whether what was done was what an ordinary prudent person would do under the same or similar circumstances. So we have here the question, Did he act in good faith relying upon the order, or did he act in bad faith and so use the order that he might benefit by it? If he did the jury or the court would naturally decide against him. Is not that correct?”

“Mr. Donnell: Yes.”

* * * * *

No. 12,229

IN THE

United States Court of Appeals
For the Ninth Circuit

KAM KOON WAN, on his own behalf and
on behalf of all other persons and
employees of defendant who are simi-
larly situated,

Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian corpo-
ration,

Appellee.

Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR E. E. BLACK, LTD., APPELLEE.

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United States v. Lindholm, 79 F. (2d) 784 (CCA 9th 1935)	4	
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No. 12,229

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KAM KOON WAN, on his own behalf and
on behalf of all other persons and
employees of defendant who are simi-
larly situated,

Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian corpo-
ration,

Appellee.

Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR E. E. BLACK, LTD., APPELLEE.

OPINION BELOW.

The opinion of the District Court on the motion for partial summary judgment is reported in 75 F. Supp. 553, and is found in the record on pages 35-66; the opinion on the coverage of the Fair Labor Standards Act is unreported and appears in the record on pages 76-86.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii is founded upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended, 48 U.S.C. Section 642; and upon paragraph 24 of the Judicial Code, 28 U.S.C. Sec. 41 (8).

The jurisdiction of this Court rests upon Title 28, United States Code, Section 1291, and upon Section 86 of the Hawaiian Organic Act, Act of April 30, 1900, c. 339 as amended, 48 U.S.C. 642.

PROCEEDINGS BELOW.

This is an action brought by employees against their employer for overtime pay and liquidated damages under the Fair Labor Standards Act of 1938.¹ The complaint was filed on November 14, 1945, and sought recovery for a period of six years prior thereto. Answer admitting some and denying others of the allegations of the complaint was filed on March 27, 1946 (R. 11). Thereafter motions to intervene were filed joining additional employees as parties plaintiff (R. 11-18). An amended answer was filed on January 31, 1947 (R. 22) asserting that defendant had paid the overtime required by the Fair Labor Standards Act after November 10, 1943, and setting up as defenses the territorial statute of limitations² and that the

¹52 Stat. 1060, 29 U.S.C. Sec. 201 et seq.

defendant was acting in compliance with military orders in paying wages during the period from December 7, 1941, to October 24, 1944. On August 13, 1947, defendant moved to amend its answer further by alleging that conformity with and reliance upon the orders of the military governor was in good faith and that the action was barred for the period after December 7, 1941, by the provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. Sec. 258. The motion was granted, and a second amended answer was filed on August 26, 1947 (R. 30).

Motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure was filed, together with supporting affidavits, on August 13, 1947 (R. 24-30). Plaintiff and intervenors filed no counter-affidavits.

After extensive argument, the District Court rendered its opinion on February 5, 1948 (R. 35), in which it granted the motion with respect to the period December 7, 1941, to November 10, 1943, on the ground that a defense under Section 9 of the Portal-to-Portal Act of 1947 had been established. It further granted the motion for the period November 10, 1943, to the date of filing of the action, November 14, 1945, on the ground that there was no violation of the Fair Labor Standards Act of 1938. The motion was denied for the period November 14, 1939, to December 7, 1941, on the ground that the territorial statute of limitations was not applicable.

²Act 174, S.L. Hawaii 1945.

Plaintiffs filed a motion for rehearing on March 11, 1948, which motion was denied on May 13, 1948 (R. 68).

The parties stipulated as to the work performed by defendant between November 14, 1939, and December 7, 1941 (R. 69-76). On August 12, 1948 (R. 86), the District Court ruled that certain of the work described in the stipulation was covered and that other jobs were not covered.

Partial summary judgment, and judgment for certain of the plaintiffs for back pay and penalties were entered on January 20, 1949 (R. 87-95).

Notice of appeal was filed by plaintiffs on February 15, 1949 (R. 96), the appeal being based on asserted error in upholding the defense under the Portal-to-Portal Act of 1947 in the ruling on the motion for summary judgment, and in failing to find that certain work as described in the stipulation was covered by the Fair Labor Standards Act of 1938.

STATUTES AND ORDERS.

The pertinent provisions of the Portal-to-Portal Act of 1947, and the text of certain military orders appear in the Appendix.

STATEMENT OF FACTS.

The complaint alleged that defendant E. E. Black, Ltd., was engaged in a general construction business (R. 3), that defendant employed plaintiffs in various capacities for the period of six years next preceding the filing of the complaint (R. 4), and that defendant failed to pay plaintiffs overtime compensation pursuant to the Fair Labor Standards Act of 1938 (R. 4-5). Plaintiffs prayed for judgment awarding them the overtime compensation due them, and an equal amount as liquidated damages, together with costs and attorney's fees (R. 6).

Defendant's final amended answer (R. 30-35) set up five defenses:

(1) That the complaint failed to state a claim upon which relief could be granted;

(2) That none of the plaintiffs was covered by the Fair Labor Standards Act of 1938;

(3) That since November 10, 1943, defendant had paid overtime compensation in the amount required by the Fair Labor Standards Act of 1938;

(4) That the wages paid by defendant between December 7, 1941, and November 10, 1943, were paid in conformity with orders of the military governor in Hawaii, and that defendant conformed with and relied upon these orders in good faith;

(5) That the action was barred by the territorial statute of limitations.

The District Court sustained the third defense, that overtime had been paid as required by the Fair Labor Standards Act since November 10, 1943 (R. 42), and this determination is not before this Court on appeal.

The District Court overruled defendant's contention that plaintiffs were barred by the territorial statute of limitations (fifth defense) for the period November 14, 1939, to December 7, 1941, and this determination also is not before this Court.

The questions raised by the appeal involve the second defense, relating to coverage, and, more importantly, the fourth defense concerning the application of the Portal-to-Portal Act of 1947, to defendant's reliance upon the orders of the military governor, and the plaintiffs' contention that the Portal-to-Portal Act of 1947, is unconstitutional.

The work done by defendant during the period November 14, 1939, to December 7, 1941, is listed and described in the stipulation of the parties (R. 69-76). These facts are undisputed, and raise only questions of law concerning the coverage of the Fair Labor Standards Act of 1938.

The defense raised under Section 9 of the Portal-to-Portal Act of 1947, was sustained on motion for summary judgment. The facts from which the District Court drew its conclusions are undisputed, either appearing in uncontroverted affidavits filed by defendant, or being judicially noticed by the Court, or being admitted in the pleadings.

Defendant was engaged in a general construction business for the United States, the Territory of Hawaii, the City and County of Honolulu, and private individuals (R. 3, 31). From December 7, 1941, to and including November 10, 1943, work by defendant under contracts with various agencies of the United States constituted not less than 80% of the total work done during that period (R. 25).

Military government obtained in Hawaii from December 7, 1941, to October 24, 1944 (R. 36). The military governor had "the full support of the Secretary of War" (R. 48, 52).

The military governor issued orders regulating the hours, rates of pay, and overtime compensation of all employees who were subject to military control (R. 26). Employees of defendant were subject to such control (R. 26, 28). Defendant was obliged to pay the wages and overtime compensation required by the military orders (R. 26, 29); violations of the orders were punishable by provost court as it saw fit (R. 37). The schedule of wages imposed by the military governor set a standard for the payment of overtime compensation to all employees subject thereto (R. 38). Defendant conformed in all respects to the wage schedules and rates of overtime compensation prescribed by the military governor (R. 26). Defendant's conformity with the military orders was in good faith, and in reliance on said orders (R. 26). On November 1, 1943, the military governor promulgated an order which changed the prior standard for overtime compensation and adopted the same standard which was

embodied in the Fair Labor Standards Act (R. 48; see Appendix C).

Based upon the above undisputed facts, the District Court found:

(1) That the questions presented were ones which could properly be decided on motion for partial summary judgment (R. 44);

(2) That defendant had "pleaded and proved" its defense under Section 9 of the Portal-to-Portal Act of 1947 (R. 45-46);

(3) That defendant conformed to and relied upon the orders of the military governor in good faith (R. 47-48);

(4) That the military orders were within the meaning of "regulation, order, ruling, approval, or interpretation" in the Portal-to-Portal Act of 1947, and that the War Department acting through the military governor, was an "agency of the United States";

(5) That the Portal-to-Portal Act of 1947, as applied, was constitutional.

Plaintiffs appealed from every part of this ruling, as well as from the District Court's application of the Fair Labor Standards Act of 1938 to certain work as described in the stipulation.

QUESTIONS PRESENTED.

1. Can a District Court determine the validity of a defense under Section 9 of the Portal-to-Portal Act of 1947 on motion for summary judgment where the facts before it are not in dispute?
 2. Did the District Court reasonably conclude that appellee had conformed with and relied upon an administrative regulation or order of an agency of the United States in good faith from the undisputed facts before it?
 3. Is the Portal-to-Portal Act of 1947, constitutional as applied to these appellants?
 4. Are employees engaged in new construction or in construction of an addition to a non-commercial part of a military base covered by the Fair Labor Standards Act of 1938?
-

SUMMARY OF ARGUMENT.

The Portal-to-Portal Act of 1947 is remedial legislation to be liberally construed. The requirement in Section 9 that a defense based thereon must be pleaded and proved does not preclude the use of the summary judgment as provided for in the Federal Rules of Civil Procedure provided there is no genuine issue as to a material fact.

On a motion for summary judgment, when the facts are not in dispute, the Court can and should make inferences of ultimate fact. This is true where the

inference to be drawn is one of good faith. The failure of appellants to file any counter-affidavits on the motion for summary judgment was an admission of the truth of the facts in appellee's affidavits.

On the uncontroverted facts presented to the District Court, the Court had no alternative but to find that appellee conformed with and relied upon the military orders in good faith. The phrase "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938 * * *" contained in General Orders No. 91, did not put appellee on notice that in complying with the order it was violating that Act. Irrespective of notice, appellee was in good faith in conforming with the military orders where any other action would subject it to punishment by the military authorities. No reasonable man would have acted otherwise.

Appellants cannot now bring forth facts which are alleged to show lack of good faith when they failed to do so before the trial Court. There are no facts in the record upon which a finding of lack of good faith could be based.

The orders of the military governor were administrative regulations or rulings within the meaning of the Portal-to-Portal Act. That they were orders of an executive department does not change their administrative character. The purposes of the Portal-to-Portal Act and the cases decided thereunder make it clear that this sort of order is within the purview of the Act.

The military governor was an agency of the United States within the meaning of accepted definitions of the word in other statutes. The term should be construed in the light of the remedial purposes of the Act. In fact, it has been construed in other cases to include offices similar to that of the military governor.

Congress has the power under the Constitution to provide a defense to statutory rights which it created even though the rights be thought to have accrued before the passage of the Act. And Congress has the power also, in the regulation of interstate commerce, to remove burdens from that commerce, even though vested, contractual rights are affected thereby.

New construction of facilities which may at some future time be devoted to commerce does not bring employees engaged in such construction within the coverage of the Fair Labor Standards Act. Construction of an addition to an existing facility remotely connected with instruments which might conceivably be used in commerce is not "commerce" or "the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

ARGUMENT.

I. CONSTRUCTION OF THE PORTAL-TO-PORTAL ACT.

A. The Act should be liberally construed.

Section 9 of the Portal-to-Portal Act of 1947 (see Appendix A) provides in part:

In any action * * * commenced prior to or on or after the date of the enactment of this Act

* * * no employer shall be subject to any liability
 * * * if he pleads and proves that the act or
 omission complained of was in good faith in con-
 formity with and in reliance on any administra-
 tive regulation * * * *such a defense*, if established,
 shall be a bar to the action * * *. (Emphasis
 supplied.)

Appellants take the position that this section estab-
 lishes an "exemption" to the Fair Labor Standards
 Act.³ This is deceiving. It is, as the section itself
 states, a defense. The use of the label "exemption"
 calls forth immediately associated ideas of narrow
 literal construction. Appellants then use the associated
 ideas as a springboard to a conclusion that the words
 "plead and prove" in Section 9 of the Act must be
 construed to require in every instance a full-fledged
 trial on Section 9 defenses, and to prohibit the use of
 summary judgments under Rule 56 of the Federal
 Rules of Civil Procedure. This logical device was a
 much abused trick in the sophist's bag. The entire
 line of reasoning depends on the accuracy of the term
 "exemption." In making use of this restrictive term,
 appellants ignore the purposes of the Act, as indi-
 cated by the congressional findings. After enumerat-
 ing ten evils to be corrected or avoided by the Act, the
 Congress stated in Section 1(b):

It is declared to be the policy of the Congress
 in order to meet the existing emergency and to
 correct existing evils (1) to relieve and protect
 interstate commerce from practices which burden
 and obstruct it; (2) to protect the right of collec-

³Appellants' Brief, pp. 17-18.

tive bargaining; and (3) to define and limit the jurisdiction of the courts. (29 U.S.C. Sec. 251.)

That the legislation is remedial cannot be doubted after an examination of the findings and policy of the Congress as stated in the Act.

Instead of an "exemption", Section 9 creates a remedial defense, to be construed just as broadly to effect the purposes of the Act as the rights under the Fair Labor Standards Act. An entirely different set of rules of construction than that propounded by appellants is called into play.

Applying the rules concerning remedial legislation, Courts have consistently construed the Portal-to-Portal Act liberally.⁴ As was said in the *Cochran*⁵ case:

In order to remedy a situation that they (Congress) in their wisdom thought required remedial legislation, they went much further—I think all parties will concede this—than they had ever gone in the enactment of legislation which dealt with a situation similar to the one we have here.

The Act is notoriously remedial; and it is neither to be construed niggardly nor to be administered with obvious hostility to its plain meaning and language.⁶

⁴*Burfeind v. Eagle-Picher Co.*, 71 F. Supp. 929 (1947); *Cochran v. St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288 (1947); see also Anno. 3 A.L.R. (2d) 1097, 1122.

⁵73 F. Supp. 288, 289 (1947).

⁶*McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716, 731 (1948).

B. The Act does not preclude summary judgments in favor of those asserting Section 9 defenses.

In the light of the above basis for construction, does the language of Section 9 of the Act, placing the burden of proof on the employer with respect to defenses there created by requiring him to "plead and prove" the defense, deny the employer the right to move in an appropriate case for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure? We submit it does not.

Rule 56(a) allows parties seeking to recover to move for summary judgment, and 56(b) extends the right to defending parties. Defendants having the burden of proof,⁷ as well as plaintiffs, are entitled to the relief in appropriate cases where no genuine issue as to a material fact has been brought to the attention of the Court. In such a case, Rule 56(c) requires that "The judgment sought shall be rendered forthwith." No exception is made in the rule. "They govern all proceedings in actions brought after they take effect."

Proof for purposes of the Portal-to-Portal Act must be construed to mean such proof as is declared to be satisfactory for the Federal Courts by the rules of procedure duly promulgated by the Supreme Court. The rights of litigants to trials of material facts are preserved. Absent any material issue, only a question of law is presented to the Court. Facts brought

⁷See: *Dillard v. Thompson*, 5 F.R.D. 26 (1945); *Pen-Ken Oil and Gas Corp.*, 2 F.R.D. 355 (1942).

⁸*Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (CA 5th 1949).

⁹F.R.C.P., Rule 86.

before the Court, if uncontroverted, are "proved" within the meaning of the rules of procedure and within the meaning of the Portal-to-Portal Act. Had Congress intended to prevent the applicability of the federal rules to the defense established by Section 9 of the Act, clearer language distinguishing this type of proof from that required in other cases in the federal courts should certainly have been used.

Appellants rely on two cases decided by this Court before the promulgation of the federal rules.¹⁰ In *United States v. Lindholm*,¹¹ this Court held that a state summary judgment law conflicted with the Tucker Act requiring proof satisfactory to the Court because—

* * * the federal judge * * * finds himself debarred from proceeding with the case under any adopted rules and denied access to any satisfactory proof of the claim * * *.

Strict construction of a statute waiving sovereign immunity required that the federal judge determine for himself what proof was or was not satisfactory. Here, as above stated, canons of strict construction are not applicable. In addition the Supreme Court, by the promulgation of the rules, has declared that the summary judgment procedure affords adequate proof in all federal causes.

¹⁰*United States v. Lindholm*, 79 F. (2d) 784 (CCA 9th 1935), followed in *United States v. Stevenson*, 79 F. (2d) 788 (CCA 9th 1935).

¹¹79 F. (2d) 784, 787 (CCA 9th 1935).

Provided that the case otherwise warranted the partial summary judgment, the Portal-to-Portal Act, Section 9, does not preclude the award thereof in this case.

II. THE ISSUE OF GOOD FAITH WAS PROPERLY DETERMINED ON UNCONTRADICTED AFFIDAVITS IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT.

The appellee proved, by the affidavit of J. M. Stevens (R. 25, 26) that it was subject to regulation by the Office of the Military Governor in Hawaii after December 7, 1941, and that it was in fact regulated with respect to wages, hours, and working conditions by General Orders issued by that office. And, swears Mr. Stevens, appellee—

* * * was obliged to obey the commands of the Military Authorities with respect to the payment of wages, hourly rates and overtime, and the release and discharge of employees employed by it during said period, and that said defendant at all times and in all respects has, in good faith, followed the military orders, wage schedules, payment of overtime and wage practices as prescribed and ordered by said Military Authorities. (R. 26-27.)

Appellants filed no counter-affidavits denying these sworn assertions of fact. In failing to do so, they admitted the facts contained in appellee's affidavits.¹²

¹²“Plaintiffs filed no counter-affidavits. I gather from their brief, although they do not specifically so state, that they rely on the presence in the case of genuine issues of fact as the reason for denial of defendant's motion. However, in the light of plaintiffs’

The instant case thus differs significantly from *Halsband v. Fuller Co.*,¹³ wherein the Court held that summary judgment would not lie in view of counter-affidavits filed by plaintiff, even though defendant's affidavits were more numerous and complete. The Court rightly held that the credibility of affiants cannot be tried on the motion.

The duty of the District Court was to apply the objective test of whether the appellee acted as a reasonable and prudent man in paying wages pursuant to the military orders, and whether there were any circumstances which should have put appellee on notice that in so doing it was violating the Fair Labor Standards Act of 1938.¹⁴

And the question now before this Court, in the language of the Court of Appeals for the Fifth Circuit, is—

whether a fair and impartial tribunal reasonably could have inferred from the uncontroverted facts¹⁵

admission arising from their failure to file counter-affidavits, I find there are no issues of fact remaining." *Allen v. Radio Corporation of America*, 47 F. Supp. 244, 245 (1942); see also, as to effect of failure to file counter-affidavits, *Geller v. Trans America Corp.*, 53 F. Supp. 625 (1943); *Farley v. Abbetmeier*, 114 F. (2d) 569 (USCA, DC 1940); *Hornbeck v. Dain Mfg. Co.*, 7 F.R.D. 605 (1947); *Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (CA 5th 1949).

¹³119 N.Y.L.J. 901 (1948); 14 Lab. Cas. par. 64,387, cited in Appellants' Brief, p. 23.

¹⁴Interpretive Bulletin, Administrator, Wage and Hour Division, Sec. 790.15, 12 F.R. 7662, November 18, 1947, Part 790, Tit. 29, Ch. V, C.F.R.

¹⁵*Creel v. Lone Star Defense Corp.*, supra.

that appellee acted in good faith in reliance upon and in conformity with the General Orders of the Military Governor.

In addition to challenging the merit of the District Court's determination of the above question, appellants question his power to decide it.

In Section I-B above, we discussed appellants' first ground for urging a lack of power in the District Court, namely, that the provisions of the Portal-to-Portal Act required a full scale trial of this issue.

Appellants urge, as a second ground for finding a lack of power in the District Court, the theory that "good faith" is an "ultimate" and "final" fact not to be established by affidavits. The *Divins* case¹⁶ is relied upon for this proposition, although it must be noted that the Court in that case recognized that good faith can "in rare instances" be established by affidavits.

It is difficult to conceive of a case presented on uncontroverted facts where a judge will not be required to draw an inference of ultimate fact. Questions have often arisen on motions for summary judgment which require the determination of an ultimate fact; such questions as whether a person is an independent

¹⁶*Divins v. Hazeltine Electronics Corp.*, 79 F. Supp. 513 (1947), cited in Appellants' Brief, p. 23.

contractor,¹⁷ and questions of intention,¹⁸ fraud,¹⁹ duress,²⁰ and reasonableness and good faith.²¹

In the *Creel* case, *supra*, the Court said, at page 968, that:

* * * wherever we turn in this case, we are confronted with the ultimate fact, established by the finding of the court below, that appellee was not an independent contractor. To ignore this fact would be to disregard Rule 56, which was promulgated by the Supreme Court. A reasonable inference fairly deducted from an uncontroverted fact or number of facts may establish the existence of an ultimate fact which entitled one of the parties to judgment as a matter of law.

To the same effect is the statement of the Court in the *Fox* case, *supra*:

Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when the conclusion is one to be drawn by the court. (pp. 736-7.)

Appellants point to the fact that they have been unable to locate any cases other than the instant case where summary judgment was granted on a Section 9 defense. This, it is said, is significant to note.

¹⁷*Creel v. Lone Star Defense Corp.*, *supra*.

¹⁸*Fox v. Johnson & Wimsatt*, 127 F. (2d) 729 (USCA, DC 1942).

¹⁹*Geller v. Trans America Corp.*, 53 F. Supp. 625 (1943); cf. *Peckham v. Ron Rico Corp.*, 7 F.R.D. 324 (1947).

²⁰*Farley v. Abbetmeier*, 114 F. (2d) 569 (USCA, DC 1940).

²¹*Dickheiser v. Penn. R. Co.*, 5 F.R.D. 5 (1945).

Such significance as might be contained in that fact is dissipated by the cases where summary judgment has been awarded. Thus, in *Blessing v. Hawaiian Dredging Co.*,²² defendant having shown by affidavit that it relied in good faith on rulings of the Chief of the Bureau of Yards and Docks, Navy Department, summary judgment in its favor was granted. In at least two other cases, summary judgment was used in sustaining a defense under Section 9 of the Act.²³ The rarity of a situation where affidavits filed in support of a motion for summary judgment are allowed to remain completely uncontroverted accounts for the scarcity of cases on the precise question.

Appellants challenge the completeness of the affidavits filed in support of the motion to establish the defense.²⁴ Of course, the legal sufficiency of the facts to support the inference drawn by the District Court is the question now before this Court. But appellants apparently argue that the facts are not detailed enough even if legally sufficient. Had appellants desired, they could have utilized the extensive discovery procedures of the Federal Rules of Civil Procedure to obtain additional facts. If they desired, even after argument on the motion, they could have sought delay in entry of the judgment so as to permit them to obtain facts upon which to base a counter-affidavit.²⁵

²²76 F. Supp. 556 (1948).

²³*Chernick v. Johnson Drake & Piper Inc.*, 121 N.Y.L.J. 1814, May 20, 1949, 16 Lab. Cas. par. 65,187; *Gordon v. White Construction Co.*, 121 N.Y.L.J. 1949, June 1, 1949; 16 Lab. Cas. par. 65,174.

²⁴Appellants' Brief, pp. 20, 21, 25.

²⁵*Peckham v. Ron Rico Corp.*, 7 F.R.D. 324 (1947).

In this connection it should be noted that although the Court ruled on the motion for summary judgment on February 5, 1948, (R. 58) the entry of partial summary judgment was delayed until January 20, 1949, (R. 88) and the final judgment was entered the same day. (R. 89). One counter-affidavit, containing any facts which might tend to create an inference of lack of good faith, would have been enough²⁶ so long as it amounted to more than a "mere denial, unaccompanied by any facts."²⁷

Appellants are not excused for their failure to deny the good faith established by appellee's affidavits by saying that the matters of fact upon which a counter-affidavit might be based lie within the exclusive knowledge of appellee.

In the first place, all the circumstances were known by everyone engaged in the construction business in Hawaii after December 7, 1941, and the bases for the objective test of reasonableness and lack of notice were readily available. If there were facts which should have put appellee on notice (other than the wording of the General Orders hereafter discussed) appellants could marshal them and put them in an affidavit. If the District Court, or even appellants, wanted more facts from appellee, the latter could have provided supplemental affidavits.²⁸ No request was made.

²⁶*Halsband v. Fuller Co.*, 119 N.Y.L.J. 901 (1948); 14 Lab. Cas. par. 64,387.

²⁷*Piantadosi v. Loews, Inc.*, 137 F. (2d) 534 (CCA 9, 1943).

²⁸Rule 56(e), F.R.C.P.: " * * * The court may permit affidavits to be supplemented * * * by further affidavits."

Secondly, even if the matter were thought to be in the exclusive knowledge of appellee, it is clear that appellants must so state in an affidavit, together with a statement of what facts are referred to, and what discovery procedures had been taken to elicit them.²⁹

On the basis of the record before it, the District Court was required to grant the motion for summary judgment, provided that the facts before it supported a fair inference that appellee relied in good faith on an administrative ruling of the type specified in Section 9 of the Act.

III. THE UNCONTROVERTED AFFIDAVITS SUPPORT THE FINDING OF THE DISTRICT COURT THAT DEFENDANT RELIED UPON AND CONFORMED WITH AN ADMINISTRATIVE REGULATION OF AN AGENCY OF THE UNITED STATES IN GOOD FAITH.

A. Good faith.

Heretofore we have examined the question whether the District Court had the power to determine that appellee acted in good faith on the basis of the uncontroverted affidavits filed in its behalf. Assuming that the power exists and could properly be exercised in a case such as this, was the inference of good faith which the District Court drew from the undisputed facts a reasonable one?

Appellants say that the inference drawn by the District Court was not reasonable, and advance the following arguments:

²⁹*Hartmann v. Time, Inc.*, 64 F. Supp. 671 (1946).

(1) The military orders were not applicable to appellee (Brief, pp. 26-31);

(2) The appellee was put on notice that it was violating the Fair Labor Standards Act by the phrase contained in General Orders No. 91 (R. 62) that—

Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938,³⁰ * * *. (Brief, pp. 34-38);

(3) The appellee's course of conduct prior to December 7, 1941, and after November 10, 1943, shows that it did not rely in good faith on the military orders (Brief, p. 39).

The first contention, that the military orders were not applicable to appellee, is not open to appellants. The affidavits (R. 24-30) make it abundantly clear that the military orders regulating wages were applicable and applied to appellee, and the District Court so found (R. 40, 44). The question is not how the military orders should be construed, but rather how were they construed by the military governor. This is a question of fact. Appellants cannot allow the fact to stand uncontroverted in appellee's affidavits, and then attempt to raise an issue for the first time in its brief on appeal.³¹

³⁰As noted by the District Court this phrase "was not in General Orders No. 38 nor in any of the other orders affecting labor—even General Orders No. 10 (New Series) until the final order, No. 40 (New Series)". (R. 37).

³¹*Allen v. Radio Corporation of America*, 47 F. Supp. 244, 245-6 (1942): "Plaintiffs endeavor to raise one in their brief by arguing that the exhibits attached to the affidavit of defendant's

Did the phrase “Nothing herein * * * etc.” put appellee on notice that it was violating the Fair Labor Standards Act? Perhaps the best answer to this question is that given by the District Court (R. 48). It makes no difference that the military governor paid lip service to outstanding federal statutes when, as a matter of fact, he commanded appellee to comply with his edicts under threat of punishment.³² Is there a possible inference of bad faith to be drawn from compliance with the rules of the highest authority in the Territory, which rules had the force of law and carried criminal sanctions? Surely this is not a situation where appellee was voluntarily choosing the regulation most favorable to him.³³ No one knew then that the military governor was exercising usurped and invalid authority. This was not decided until the Supreme Court decision three years later.³⁴ And that case does not hold that the military governor had no authority to regulate the wages and hours of employees during the years 1941 to 1943. In addition, the order itself, after requiring the payment of certain straight and overtime rates, stated—

Nothing herein shall be construed as * * * in conflict with the provisions of the Fair Labor Standards Act of 1938 * * *.

General Orders No. 91 (R. 63) was clear in providing for payment of one and one-half the regular rate for

expert do not corroborate his statements * * *. Rule 56, it seems to me, does not contemplate the raising of an issue of fact for the first time in a brief of counsel * * *.”

³²See General Orders No. 4, R. 60.

³³Cf. Appellants' Brief, pp. 36-37.

³⁴*Duncan v. Kahanamoku*, 327 U. S. 304 (1946).

overtime in excess of *forty-four* hours. There was no room for construction of this requirement. It was clear on its face. But it was not to be "construed" to conflict with the Fair Labor Standards Act of 1938 which, it now appears, required payment for overtime after forty hours. The "Nothing herein" clause was in reality a declaration by the military governor that General Orders No. 91 did not conflict with the Fair Labor Standards Act with respect to those persons whose wages were established by it. That is why the same standards were laid down in General Orders No. 10 (Appendix B) although the "Nothing herein" clause was not incorporated in that order.

This interpretation is supported by the ruling issued by the acting administrator to the agent in Hawaii in charge of the Wages and Hour Division of the United States Department of Labor (R. 39). The agent participated in the military governor's control of labor. The ruling was that if the Fair Labor Standards Act of 1938 were not suspended, workers performing labor pursuant to martial law might be considered exempt as government employees. The District Court treated this fact as "interesting but non-usable" (R. 42). However, it was placed before the Court in affidavit to show, not that appellee relied on this radiogram for purposes of a Section 9 defense, but to demonstrate that the "Nothing herein * * *" clause was not designed to preserve the application of the Fair Labor Standards Act to the employees covered by the General Order, but rather was an interpretation by the military governor that his regula-

tions were perfectly consistent with the Fair Labor Standards Act. His labor experts had been authoritatively advised that these workers were exempt. Indeed, it has been held, and we submit properly so, that where employers were forced to comply with administrative rulings, even though they admittedly knew that the rulings were contrary to those of the administrator of the Wage and Hour Division, they had acted in good faith.³⁵ This matter of compliance and reliance will be taken up again below. But it is clear that an employer in such circumstances does not pick "one of the rulings on which to rely" and choose "the ruling that is most favorable to his, the employer's interest."³⁶ The Portal-to-Portal Act protects persons who were misdirected and misled by their government, so that they were brought into violation of law. If the employer is protected by voluntary good faith reliance on administrative rulings, it would be a mockery of the law and the defense to deny its protection to an employer who in good faith had no alternative but to violate the Fair Labor Standards Act.

The third contention advanced by appellants to show that the District Court erred in finding that appellee acted in good faith is that appellee's violation of the Fair Labor Standards Act before December 7, 1941, and its compliance with the requirements of that act after November 10, 1943, while it was still under

³⁵*Curtis v. McWilliams Dredging Co.*, 78 NYS (2d) 317 (1948), 119 N.Y.L.J. 744.

³⁶See language of Congressman MacKinnon, 93 Cong. Rec. Part IV, p. 4391, May 1, 1947; Appellants' Brief, p. 36.

military orders negative an inference of good faith reliance on the orders during the period December 7, 1941, to November 10, 1943.

The record is clear (R. 25) that appellee paid appellants at the rate of time and one-half for all work in excess of forty hours per week after November 10, 1943, except for two clerical employees (R. 25) and the District Court so found (R. 42). As the Court said (R. 42):

November 10, 1943, it will be recalled, marked the date on and after which it was possible incidentally to meet the requirements of the Fair Labor Standards Act as well as to obey the military orders.

General Orders No. 91 (R. 62-66) and General Orders No. 10, dated 10 March 1943 (Appendix B) both required payment of time and one-half the regular rate for hours in excess of forty-four in one week. General Orders No. 40 (New Series) dated 1 November 1943 (Appendix C) changed the foregoing and required that employees—

* * * shall be paid overtime at the rate of one and one-half the regular rate, for overtime in excess of forty (40) hours per week * * *.

Thus for the first time, compliance with the military orders became tantamount to compliance with the Fair Labor Standards Act. Appellants' argument (Brief, pp. 39-40) that compliance with the Fair Labor Standards Act after November 10, 1943, conclusively shows no good faith reliance on the military

orders prior thereto, proceeds on the erroneous assumption that the substance of the orders was the same up to the cessation of the military government on October 24, 1944. It was not. The change in orders with General Orders No. 40, *supra*, brought the military interpretation in line with the now accepted interpretation of the Fair Labor Standards Act. Continued reliance upon and compliance with the orders brought about eventual admitted compliance with the federal law.

Appellants point out that there was no showing of a change in payment of overtime when appellee first came under the military orders (Brief, p. 21), and then argue that violations prior to December 7, 1941, demonstrate that there was no good faith reliance on military orders after that date. Here again, appellants are ignoring the summary judgment procedure. After appellee filed its affidavit it was incumbent upon appellants to bring before the Court other facts which might have shown a lack of good faith. Additional facts could have been called for by appellants³⁷ and the lack of additional facts could have been stated by appellants in affidavits even though they did not have facts at hand to controvert good faith.³⁸ Instead, appellants slept on their rights, invited the District Court to take an action which they now assert was error and, in their brief, attempt to raise a question whether, if additional facts had been brought out, an issue with respect to good faith reliance would have

³⁷*Peckham v. Ron Rico Corp.*, *supra*.

³⁸*Hartmann v. Time, Inc.*, *supra*.

been made out.³⁹ Such action converts a device of judicial simplification and economy into an instrument of complication and delay. It frustrates the purpose of the summary judgment procedure.

The question of good faith before December 7, with respect to violations found by the Court to have taken place in that period, was not urged upon the Court. The hearings subsequent to the decision on the motion for partial summary judgment were devoted to coverage.

Bearing on the "history of previous violations"⁴⁰ the cases are clear that both the War⁴¹ and Navy⁴² Departments took the view that cost-plus-fixed-fee contractors were not subject to the Fair Labor Standards Act.

Had appellants thought that additional facts had come out from which an inference of bad faith could be drawn, it was their duty, in the hearings subsequent to the decision on the motion for summary judgment, to bring such facts to the attention of the Court. The matter of additional evidence and its effect was before the District Court in a hearing on January 14, 1949 (R. 115-122), but at no time did appellants seek, by affidavit or evidence, to prove that actions prior to December 7, 1941, showed a lack of good faith, and the matter was not urged upon the Court, although the summary judgment was not entered on the Court's

³⁹See *Allen v. Radio Corporation of America*, supra.

⁴⁰Appellants' Brief, p. 37.

⁴¹*Curtis v. McWilliams Dredging Co.*, supra.

⁴²*Kenney v. Wigton-Abbott Corp.*, 80 F. Supp. 489 (1948).

decision until January 20, 1949 (R. 87), the decision having been rendered on February 5, 1948 (R. 35).

The only reasonable inference to be drawn by the District Court from the facts before it was that appellee relied in good faith upon the military orders.

B. Reliance.

The phrase "Nothing herein * * *" contained in General Orders No. 91 (R. 62) did not serve to put appellee on notice that it was violating the Fair Labor Standards Act. Irrespective of the effect of this phrase, however, it is firmly established in the record that the military orders required appellee to pay overtime compensation at a certain rate under pain of punishment. This fact alone establishes the defense under Section 9 of the Act. Should appellee have risked trial by a military tribunal, and taken the matter before a Court to test the validity of the military governor's regulation of wages? An employer does not carry such a burden under the Act. If he acted as a reasonable and prudent man would have acted under the circumstances he is in good faith.⁴³

Would a reasonable and prudent employer in 1941 or 1942 or 1943, during the early days of the war, doing war work under Army supervision on islands known to be vulnerable to attack, have dared to refuse to comply with orders issued by the military governor? And such compliance cannot be distinguished

⁴³Interpretive Bulletin, 12 F.R. 7655, Part 790, Tit. 29, Labor, Chap. V, Sec. 790.1-790.29, C.F.R.

from reliance as required by Section 9. As the administrator has said, "regulations" and "orders" refer to rulings having the binding force of law, and requiring compliance.⁴⁴ Nor does subsequent determination of invalidity affect prior reliance on the regulation.⁴⁵ Section 9 provides that a judicial determination that a regulation is invalid or of no legal effect does not prevent a defense based thereon from barring an action.

The situation presented here is much the same as that before the Court in *Curtis v. McWilliams Dredging Co.*⁴⁶ where the War Department required the payment of a wage scale which violated the Fair Labor Standards Act. On February 19, 1943, Executive Order 9301 was promulgated, containing virtually the same "Nothing herein * * *" clause as General Orders No. 91. Thereafter, on May 13, 1943, the War Department issued a circular letter providing for payment of overtime not in compliance with the Fair Labor Standards Act. The War Department considered the Executive Order and

believed that Circular Letter 2390 complied with the Presidential proclamation; and that the Fair Labor Standards Act did not apply.

The employer wrote to the War Department stating that the Fair Labor Standards Act allowed overtime to his employees, but the War Department forbade the

⁴⁴*Ibid.*, Sec. 790.17 (b).

⁴⁵*Ibid.*, Sec. 790.17 (h); see *Duncan v. Kahanamoku*, *supra*, which does not, however, go so far as to hold the labor regulations invalid.

⁴⁶78 NYS (2d) 317 (1948), 119 N.Y.L.J. 744.

payment thereof. On the issue of good faith reliance, the Court said:

And, indeed, what was there for the defendants to do? The plaintiffs suggest that there was an absence of good faith on the defendant's part * * * As between the administrator and the War Department, obviously, the defendant had to abide by the rulings of the department with which it was dealing. It could not with impunity act in defiance of those rulings. To repeat the language of the President in approving the Portal-to-Portal Act, the defendants have met "an objective test of actual conformity with an administrative ruling or policy".⁴⁷

IV. THE ORDER OF THE MILITARY GOVERNOR WAS A REGULATION, ORDER, RULING, APPROVAL, OR INTERPRETATION OF ANY AGENCY OF THE UNITED STATES WITHIN THE MEANING OF SECTION 9 OF THE PORTAL-TO-PORTAL ACT.

A. The military orders were administrative regulations, etc., within the meaning of the Portal-to-Portal Act.

Appellants attempt to distinguish between "executive" orders such as those issued by the military governor, and "administrative" orders contemplated by Section 9. Nevertheless, they urge the Court to apply the definition of "agency" contained in other statutes, and mention, among others, the Federal Register Act.⁴⁸ This act, far from distinguishing between executive and administrative functions, defines "agency" as

⁴⁷78 NYS (2d) 317, 328 (1948); this court held Section 9 unconstitutional. The latter holding was reversed on appeal and judgment directed for defendant on April 7, 1949. 16 Lab. Cas. par. 65,101.

⁴⁸44 U.S.C., Sec. 304; see Appellants' Brief, p. 46.

the President of the United States, *or any executive department*, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the government of the United States, but not the legislative or judicial branches * * *. (Emphasis supplied.)

This definition was referred to by the Wage and Hour administrator in his Bulletin of November 18, 1947.⁴⁹ Executive orders and rulings are specifically included therein. In passing, it may be well to note that the Federal Register Act definition is far more apt to the problems of the Portal-to-Portal Act than the more limited definition of the administrative Procedure Act.⁵⁰ Canons of liberal construction are applicable. All agencies were being defined, just as all agencies are covered by Portal-to-Portal Act, whereas only such agencies were covered by the Administrative Procedure Act whose structure would permit codification of their procedure.

Under the above definition, appellants are clearly in error when they would exclude the War Department from the definition of agency.⁵¹

Jackson v. Northwest Airlines, Inc.,⁵² does not affect the conclusion that the military orders are administrative for purposes of the Portal-to-Portal Act. The contracting officer of the Air Corps in that case was merely determining operations under the contract

⁴⁹Supra, Sec. 790.19.

⁵⁰ 5 U.S.C., Sec. 1001.

⁵¹Appellants' Brief, p. 46.

⁵²76 F. Supp. 121 (1948).

which he had entered into for the government. And all he undertook to do was reimburse the company should it be held to have violated the Fair Labor Standards Act. Here was no regulation of wages. The real question in that case was whether the interpretation by the Chairman of the Railway Labor Board could be considered a Board or Agency interpretation.

In a number of instances, efforts by executive departments to regulate wages have been held to constitute defenses under the Act, even though the executive departments concerned were not issuing regulations ancillary to an existing executive order or statute so much as exercising a regulatory power on the assumption that no executive order or statute was applicable. This is true of rulings by the War Department⁵³ and Navy Department, Bureau of Yards and Docks.⁵⁴ These regulations were "executive" regulations within the meaning of appellants' definition, but there was no doubt in the mind of the Courts that they were also administrative regulations within the meaning of the Portal-to-Portal Act.⁵⁵ So, too, were the orders of the military governor, issued from an agency of the United States,⁵⁶ which regulated the payment of wages by employers of the class to which appellee belonged on

⁵³*Curtis v. McWilliams Dredging Co.*, supra.

⁵⁴*Blessing v. Hawaiian Dredging Co.*, 76 F. Supp. 556 (1948); *Kenney v. Wigton-Abbott Corp.*, supra.

⁵⁵Apparently this was clear also to Representative Gwynne, the sponsor of the Act in the House of Representatives, for he remarked that "This good faith provision extends to any administrative order * * * of any department of the executive branch of the government * * *." Cong. Rec., January 2, 1947, p. 1545.

⁵⁶See *infra*, IV-B.

the assumption that the Fair Labor Standards Act was not applicable. It is idle to say that the principle of protection against government misregulation contained in the Portal-to-Portal Act is not applicable because the War Department is an "executive department" rather than an "administrative agency". The reasons for protection are the same as if the regulation were that of the War Labor Board⁵⁷ or, indeed, of the Wage and Hour Division itself.

B. The military government was an agency of the United States within the meaning of the Portal-to-Portal Act.

The District Court found

that despite its probable unlawful nature, despite exceeding its jurisdiction, these things were done by the Army with the full support of the War Department (R. 52).

Nevertheless, appellants seek to go behind this finding of fact to urge that

the Military Governor was not actually vested with final authority to speak as the War Department * * *.⁵⁸

We have already shown that the War and Navy Departments were "agencies" within the meaning of the Portal-to-Portal Act, and that the Bureau of Yards and Docks under the Navy Department was likewise such an agency.⁵⁹ It is not required that rul-

⁵⁷See *Brueshke v. Joshua Hendy Corp.*, 14 Lab. Cas. par. 64,266 (1947).

⁵⁸Appellants' Brief, p. 48.

⁵⁹Supra, footnotes 53 and 54.

ings be made by the Secretary of the Navy, or the Chief of Naval Operations.⁶⁰ The War Department "supported" the military governor in issuing his orders regulating the wages, hours, and working conditions of labor.⁶¹ These were orders of the highest authority, having the force of law.

It matters not that the tenure of the military governor was subsequently held to be unlawful,⁶² for subsequent determinations of invalidity do not affect prior reliance.⁶³ Furthermore, the *Duncan* case did not hold that the military governor had no power to regulate wages in the Territory during the years 1942-43.

By what theory, then, can this action by the United States government, through its agency, be differentiated from other actions so that the remedial provisions of the Portal-to-Portal Act should not be applied? The War Department is an agency. It supported and approved the actions of the military governor. Wages paid by appellee were regulated by orders issued by that office. Appellee complied and conformed with, and relied upon, those orders. As a result of such conformity, appellee has now been sued for additional compensation by a number of its employees.

⁶⁰Cf. suggestion in Appellants' Brief, pp. 44-45.

⁶¹In fact, the military governor received the President's support with respect to labor regulation. See e.g., items (5) and (6), Appendix D.

⁶²*Duncan v. Kahanamoku*, supra.

⁶³Interpretive Bulletin, November 18, 1947, 12 F.R. 7655.

Appellants rely heavily on the Administrative Procedure Act, which contains a definition of "agency".⁶⁴ We have already pointed out that this definition is more limited in scope than that contained in the Federal Register Act.⁶⁵ The latter act applies to all "agencies", as does the Portal-to-Portal Act. The Administrative Procedure Act applies to agencies which can be conveniently grouped to have their procedures codified.⁶⁶ In addition, the remedial purpose of the Portal-to-Portal Act, protecting employers against government misguidance, is better served by applying a definition broad enough to cover all agencies of the government. As indicated by the Federal Register Act, an "agency" is every office of the government of the United States "but not the legislative or judicial branches".

The exceptions to the Administrative Procedure Act are not effective to show that whatever was excepted from that Act was excepted also from the Portal-to-Portal Act. The Administrative Procedure Act is used only as one of several guides to construction.

Nevertheless, in answer to appellants, we say that the military government was not in fact the government of the Territory, nor the *alter ego* thereof. It was a government agency which exerted the power to

⁶⁴5 U.S.C., Sec. 1001.

⁶⁵44 U.S.C., Sec. 304.

⁶⁶For instance, Section 1001(a) excludes from the definition of "agency" certain "agencies composed of representatives of the parties", but nevertheless makes all the excluded agencies including military commissions subject to Section 1002 which required all agencies to publish their rules in the Federal Register.

supersede the Territorial government. It exercised an entirely executive, administrative power. No legislature, and no judiciary participated. It exercised quasi-legislative and quasi-judicial powers just as do most other government agencies, but without the benefit of Court review save by habeas corpus. Clearly the military governor acted differently than the Territorial government. He was not the repository of the latter's powers.⁶⁷ He cannot be equated with it for purposes of statutory construction.

As to appellants quoting General Richardson (the military governor) to show that Hawaii was a "combat zone"⁶⁸ and therefore he was exercising military authority "in the field in time of war or in occupied territory * * *,"⁶⁹ we need only point to the opinions in the *Duncan* case. Justice Black says:⁷⁰

We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory * * *.

Mr. Chief Justice Stone's concurring opinion⁷¹ effectively lays to rest the suggestion that Hawaii was a "combat zone" by pointing to the fact that—

the record here discloses no such conditions in Hawaii, at least during the period after February 1942, and the trial court so found.

⁶⁷See *Duncan v. Kahanamoku*, supra.

⁶⁸Appellants' Brief, p. 48.

⁶⁹Administrative Procedure Act, 5 U.S.C. 1001 (a) (3).

⁷⁰327 U. S. 304, 314.

⁷¹327 U. S. 304, 335-337.

We submit that the term "agency" in the Portal-to-Portal Act should be broadly construed, and is broad enough to cover the War Department acting through the military governor.

Even if the narrow definition of the Administrative Procedure Act is adopted, the military government of Hawaii, had it been legally constituted, would have been covered. And the illegality of the agency is immaterial to the question of a Section 9 defense.

V. SECTION 9 OF THE PORTAL-TO-PORTAL ACT IS CONSTITUTIONAL.

The argument advanced by appellants, that they cannot be deprived of their rights to overtime pay, characterized as vested, by a subsequently enacted statute, has been urged upon many Courts and always overruled. The defenses given to employers by Sections 2, 9 and 11 of the Act have uniformly been held valid and constitutional. The contention is so without merit in the light of the decided cases that we do no more here than call the attention of the Court to a few of the leading cases on the question.⁷² Other District Court cases, too numerous to mention, have reached the same result. The result is the same whether the rights of employees are considered statutory or contractual.⁷³

⁷²*Darr v. Mutual Life Ins. Co.*, 169 F. (2d) 262 (CCA 2d 1948), cert. den. 335 U. S. 871 (1948); *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317 (CCA 6th 1948); *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58 (CCA 4th 1948).

⁷³See *Darr v. Mutual Life Ins. Co.*, supra, and *Battaglia v. General Motors Corp.*, 169 F. (2d) 254 (CCA 2d 1948).

VI. THE RULINGS OF THE DISTRICT COURT WITH RESPECT
TO COVERAGE WERE CORRECT.

Two questions are raised by this appeal as to whether activities of appellee prior to December 7, 1941, were covered by the Fair Labor Standards Act:

(1) Is new construction of facilities which might be used for commercial purposes covered by the Act?

(2) Is construction for the government on a military reservation "commerce" or "the production of goods for commerce"?

In our opinion, the District Court correctly answered the foregoing questions in the negative.

Appellants have not contested the District Court's determination with respect to new construction⁷⁴ except with regard to new construction of:

servicing landing mat, Fourteenth Naval District;

concrete radio shelters, Army;

new wharf at Port Allen, Kauai;

new wharf for Inter-Island Steam Navigation Company;

new pier and shed for the same company;

new substations at Hickam Field for Mutual Telephone Co.;

new trenches for Hawaiian Electric Co., and Honolulu Gas Co.⁷⁵

⁷⁴See Interpretive Bulletin No. 5, par. 12, October 1940, CCH, LLR par. 24,179.

⁷⁵Appellants' Brief, pp. 52-53.

In asserting that the above construction is covered by the Act, appellants rely on the *Ritch* case, decided by this Court in 1946.⁷⁶ That case held that employees of a dredging company engaged in dredging channels in navigable waters were covered, even though the channels had been used exclusively by Navy vessels. It was reasoned that Navy vessels serve some commercial purposes. This decision is clearly sound. It is now well established that employees engaged in improvement or reconstruction of interstate facilities are covered by the Act. This is true of dikes⁷⁷ and bridges.⁷⁸ It is also true as to the reconstruction of highways.⁷⁹

Appellants argue that "new construction of an instrumentality of commerce does constitute commerce within the meaning of the Act."⁸⁰ It is asserted that the above listed jobs would be instrumentalities of commerce when completed and that they are therefore covered by the Act.⁸¹ This conclusion is demonstrably erroneous.

By the stipulation filed as to work performed prior to December 7, 1941 (R. 69-76), all of the contested rulings of the District Court with respect to coverage involve new facilities. There is no question of recon-

⁷⁶*Ritch v. Puget Sound Bridge and Dredging Co.*, 156 F. (2d) 334 (CCA 9th 1946).

⁷⁷*Walling v. Patton-Tulley Transportation Co.*, 134 F. (2d) 945 (CCA 6th 1943).

⁷⁸*Engbretsen v. E. J. Albrecht Co.*, 150 F. (2d) 602 (CCA 7th 1945).

⁷⁹*Walling v. McCrady Construction Co.*, 156 F. (2d) 932 (CCA 3d 1946).

⁸⁰Appellants' Brief, p. 52.

⁸¹*Ibid.*, p. 53.

struction or improvement of, addition or extension to, interstate facilities.

The sole question posed as to coverage, then, is whether new construction of facilities which may, upon completion, be used in interstate commerce, is covered by the Act.

Where a drydock fronting on a navigable stream is being constructed, the workers engaged therein are not covered by the Act.⁸²

So too, the construction of a new factory to be devoted to commerce⁸³ and the construction of a graving dock and adjacent channel and waterfront at Roosevelt Roads in Puerto Rico⁸⁴ are not covered. The question is not what the ultimate use of the buildings or objects constructed will be, but whether *they have already been* in some way a facility or instrument of commerce.

The decisions are analyzed and this distinction carefully drawn by Judge Augustus M. Hand in *Scholl v. McWilliams Dredging Co.*⁸⁵ There he says—

The difficulty, however, with treating the plaintiff as covered by the Act is that his work did not relate to repair or even to reconstruction of an existing instrumentality of commerce but to completely new construction. (p. 732.)

⁸²*Brue v. Steers, Inc.*, 60 F. Supp. 668 (1945).

⁸³*Kelly v. Ford, Bacon & Davis*, 162 F. (2d) 555 (CCA 3d 1947).

⁸⁴*Nieves v. Standard Dredging Corp.*, 152 F. (2d) 719 (CCA 1st 1945).

⁸⁵169 F. (2d) 729 (CCA 2d 1948).

Distinguishing the *McCraday*, *Ritch* and *Patton-Tully* cases⁸⁶ Judge Hand went on to say:

These decisions, however, expressly stressed that the work was upon instrumentalities which had already been used in interstate commerce, distinguishing the construction of new installations which had not been devoted to commerce before. (p. 732.)

In view of the foregoing, the District Court was manifestly sound in deciding that the new construction of facilities which might one day be devoted to commerce is not covered by the Act.

The one job which may not have been new construction governed by the foregoing authorities was:

additions to the battery charging distribution system at the submarine base, Pearl Harbor. (R. 69.)

There is nothing in the stipulated facts which would bear out the assumption of appellants that this charging system had ever been or would be devoted to commercial purposes. Submarines use electric power while submerged. Except for very recent developments, the submarines were unable to recharge their batteries under water. An essential part of a submarine base, then, is a plant for recharging batteries.

Adding to such a plant is entirely local construction. Even assuming that submarines could be used occasionally for commercial purposes, the plant which charges their batteries for undersea operations could

⁸⁶Supra, footnotes 76, 77 and 79.

not be so used. Granting that dredging of the channel at Pearl Harbor might have been covered, even though the harbor were used entirely by naval vessels,⁸⁷ this reasoning is not equally applicable to construction of the naval base built on the harbor. While the harbor and channel may have been navigable waters and instruments of commerce, it is clear that the military reservation was not. It was to be used for the multitude of operational, administrative and supply functions with which naval shore bases served the fleet in time of war, and was far removed from any commercial activity. The District Court was right in ruling that the addition to the battery-charging distribution system was not "commerce" nor "the production of goods for commerce."⁸⁸

CONCLUSION.

This case could arise nowhere but in Hawaii, for only in Hawaii was the Army area commander authorized by the War Department to take such authority and issue such orders as those upon which appellee relied here. Nevertheless, this type of order created a situation which Congress found it imperative to remedy by the passage of the Portal-to-Portal Act. And

⁸⁷Cf. *Ritch v. Puget Sound Bridge and Dredging Co.*, *supra*, footnote 76.

⁸⁸*Divins v. Hazeltine Electronics Corporation*, 163 F. (2d) 100 (CCA 2d 1947), and see: *Crabb v. Welden Bros.*, 65 F. Supp. 369 (1946), affirmed as to point here involved, 164 F. (2d) 797 (CCA 8th 1947); *Walling v. Craig*, 53 F. Supp. 479 (1943); *McLeod v. Threlkeld*, 319 U. S. 491 (1943).

employer under the jurisdiction of the War Department and the military governor (whether rightfully or wrongfully seized) pays his employees in reliance upon and in conformity with orders of the military governor. The District Court correctly held that Congress constitutionally could protect employers from government misdirection as it tried to do in the Portal-to-Portal Act of 1947, and that the protection applied to appellee who acted in good faith in reliance upon orders of the military governor. We submit that the judgment appealed from should be affirmed.

Dated, Honolulu, Hawaii,
September 1, 1949.

Respectfully submitted,

J. GARNER ANTHONY,

WILLIAM F. QUINN,

Counsel for Appellee.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendices A, B, C and D Follow.)

Appendices.

Appendix A

PORTAL-TO-PORTAL ACT OF 1947, 29 U.S.C., PAR. 258.

Sec. 9. *Reliance on Past Administrative Rulings, Etc.*

In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Appendix B

10 March 1943

GENERAL ORDERS No. 10 Labor

1. Policy.
2. Registration.
3. Employment.
4. Wages.
5. Hours of Work and Overtime.
6. Use of Labor.
7. Appeal Agency.
8. Child Labor.

1. *Policy.*

1.01. The following policies are announced for the information and guidance of employers employing the services of (a) employees of the United States under the War Department or the Navy Department; (b) workers employed on construction and other projects under the War Department or the Navy Department; (c) stevedores and other workers employed on docks and dock facilities; and (d) employees of public utilities. The same policies shall be equally applicable to employees of the above-mentioned employing agencies.

2. *Registration.*

2.01. Any person, now or hereafter employed by any of the employers to whom reference is made in

Paragraph 1.01, and who ceases to be so employed, shall, within two (2) days after ceasing to be so employed, register or re-register with the nearest office of the United States Employment Service.

2.02. Every employer described in Paragraph 1.01 shall notify the nearest office of the United States Employment Service on Form USES-(H)1, prescribed by the United States Employment Service, of any employee added to such employer's payroll and on Form USES-(H)2, prescribed by the United States Employment Service, of any employee dropped from such employer's payroll, within two (2) days thereafter.

2.03. Any person, firm, or corporation who violates, refuses, fails or neglects to comply with any of the provisions of Paragraphs 2.01 and 2.02 above, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned for not more than one (1) year, or both.

3. *Employment.*

3.01. Employers described in Paragraph 1.01 may maintain their own labor recruiting facilities.

3.02. The United States Employment Service hereby is designated as the central employment agency for the distribution of civilian labor hereby required to register, and shall allocate labor in the fulfillment of employers' requisitions in accordance with priorities established by the Office of the Military Governor.

3.03. No employer described in Paragraph 1.01 shall employ or offer to employ an individual for-

merly, now, or hereafter in the employment of other such employers, unless and until such individual shall have presented to the employing agency a bona fide release without prejudice, on Form USES-(H)2, from his last previous employer or from the Director of Labor Control, and evidence of registration on Form USES-350, or Form USES-506.

3.04. Any individual, who is, has been, or hereafter shall be, employed by any employer described in Paragraph 1.01, who presents himself to any other such agency and secures or attempts to secure employment without having a bona fide release without prejudice from his last previous employer, or from the Director of Labor Control, or in any way misrepresents his employment status with regard to such release, shall upon conviction, be fined not more than two hundred dollars (\$200.00), or be imprisoned for not more than two (2) months, or both.

3.05. Any employer or employer's agent who shall cause any individual to be employed in contravention of Paragraph 3.03 hereof, shall, upon conviction, be fined not more than two hundred dollars (\$200.00), or be imprisoned for not more than two (2) months, or both.

4. *Wages.*

4.01. Revised Wage Schedule No. 9, dated 3 May 1942 and effective at the beginning of the first payro period after 3 May 1942, hereby is designated as the standard wage scale for workers engaged in work of construction and other projects under the War D

partment or the Navy Department. No person seeking work or employed on construction or other projects under the War Department or the Navy Department shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in Wage Schedule No. 9, and as same may be revised from time to time as approved by the Military Governor.

4.02. Federal agencies under the War Department or the Navy Department shall continue their regularly established wage schedules.

5. *Hours of Work and Overtime.*

5.01. Normal work week for employees on construction and other projects under the War Department or the Navy Department shall be six (6) days of eight (8) hours each. The maximum number of hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergency and with the approval of the Chief of Military or Naval Service concerned.

5.02. Normal work week for employees of the United States under the War Department or Navy Department shall conform to applicable Federal regulations.

5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per week, or in excess of eight (8) hours in any one day. Double the regular rate will be paid for work performed on the seventh consecutive work

day. One and one-half the regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day.

5.04. Paragraph 5.03 above shall not apply to employees who are in a supervisory capacity on a monthly salary basis.

5.05. Employees of the United States under the War Department and the Navy Department shall be paid overtime in accordance with applicable Federal regulations.

5.06. For employees engaged on construction and other projects under the War Department and the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days.

5.07. The provisions of any contract between individual employees, labor unions, and employers engaged on construction and other projects under the War Department or the Navy Department, in conflict with the provisions of this General Order hereby are suspended.

6. *Use of Labor.*

6.01. Terms of labor contracts between individuals and employers engaged on construction and other projects under the War Department or the Navy Department which restrict or specify the nature of work to be performed, hereby are suspended.

6.02. Any person now or hereafter employed by any employer described in Paragraph 1.01 hereof shall report regularly to the job to which he is ordered by said employer.

6.03. Employers and employers' agents described in Paragraph 1.01 are directed to refrain from discriminatory practices toward employees with regard to releases or other matters relating to termination of employment.

6.04. No employer or employer's agent shall fail or refuse to abide by the decisions of the Director of Labor Control on any matters within the meaning of Paragraph 6.03.

6.05. Any person, firm, or corporation who or which violates, refuses, fails, or neglects to comply with any of the provisions of Paragraphs 6.01 to 6.04 inclusive, or who or which evades or attempts to evade any of the provisions of said Paragraphs 6.01 to 6.04, inclusive, upon conviction thereof, if a natural person, shall be punished by confinement, with or without hard labor, not to exceed two (2) months, or by a fine not to exceed two hundred dollars (\$200.00), or by both such confinement and fine, or, if a corporation or other than a natural person, by a fine not to exceed two hundred dollars (\$200.00).

7. *Appeal Agency.*

7.01. Persons discharged with prejudice from employment with employers mentioned in Paragraph 1.01 hereof, may appeal their cases to the Appeal Agency, Office of the Director of Labor Control, for decision

as to whether or not they may be allowed to continue work with another employer.

7.02. The Director of Labor Control, Office of the Military Governor, hereby is designated as the Appeal Agency for persons discharged with prejudice by employers described in Paragraph 1.01. Any individual not satisfied with the decision of the Appeal Agency may appeal his case to the Labor Control Board of the Military Governor.

8. *Child Labor.*

8.01. Employers described in Paragraph 1.01 shall comply with the provisions of Section 18 of Chapter 259-B of the Revised Laws of Hawaii 1935, as enacted by Act 237 of the Session Laws of Hawaii 1939, and amended by Act 319, Session Laws of Hawaii, Regular Session 1941.

By order of the Military Governor of the Territory of Hawaii.

Thomas H. Green
Brigadier General, A.U.
Executive

Appendix C

TERRITORY OF HAWAII

OFFICE OF THE MILITARY GOVERNOR

IOLANI PALACE

HONOLULU, T.H.

1 November 1943

GENERAL ORDERS)

No. 40)

AMENDMENTS TO GENERAL ORDERS

1. AMENDMENTS TO GENERAL ORDERS No. 10, THIS OFFICE, 10 MARCH 1943.

1.01. Paragraph 1.01, Title 1, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

"1.01. The following policies are announced for the information and guidance of employers employing the services of (a) employees of the United States under the War Department or the Navy Department; (b) workers employed on construction and other projects under the War Department or the Navy Department; (c) stevedores and other workers employed on docks and dock facilities; and (d) employees of public utilities. The same policies shall be equally applicable to employees of the above-mentioned employing agencies. Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938 or the Walsh Healey Public Contracts Act."

1.02. Paragraph numbered 2.01, Title 2, General Orders No. 10, this office, 10 March 1943, hereby amended to read as follows:

“2.01. Any person now or hereafter employed by any of the employers to whom reference is made in Paragraph 1.01 and who ceases to be so employed shall, within two (2) days after ceasing to be so employed, register or re-register at the nearest office of the U. S. Employment Service and shall not accept employment with any other employer in the Territory of Hawaii, regardless of whether such employer is or is not an employer described in Paragraph 1.01, until so directed by the U. S. Employment Service.”

1.03. Paragraph numbered 2.02, Title 2, General Orders No. 10, this office, 10 March 1943, hereby amended to read as follows:

“2.02. Every employer described in Paragraph 1.01 shall notify the nearest office of the United States Employment Service on Form 14-E, Section of Labor Control, Office of the Military Governor, of any employee dropped from such employer's pay roll, within two (2) days thereafter.”

1.04. Paragraph numbered 3.03, Title 3, General Orders No. 10, this office, 10 March 1943, hereby amended to read as follows:

“3.03. No employer described in Paragraph 1.01 shall employ or offer to employ an individual formerly, now, or hereafter in the employment of other such employers, unless and until, such individual shall have presented to the employing agency a bona fide

release, without prejudice, on Form 14-E, Section of Labor Control, Office of the Military Governor, from his last previous employer, or from the Director of Labor Control and evidence of referral on Form USES 508."

1.05. Paragraph numbered 4.01, Title 4, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, General Orders No. 24, this office, 18 June 1943, hereby is amended to read as follows:

"4.01. Revised Wage Schedule No. 9, (Fourth Re-Issue), dated 1 November 1943, and effective at the beginning of the first pay roll period after 1 November 1943, hereby is designated as the standard wage scale, except as noted in Paragraph 4.03, for workers engaged in work on construction and other projects under the War Department or the Navy Department and employers of such other employees as may be designated from time to time by the Military Governor. No persons seeking work or employed on construction or other projects under the War Department or the Navy Department, or with other employers designated by the Military Governor, shall be employed at a rate less than, or in excess of, the standard rate for the job as listed in said Revised Wage Schedule No. 9, (Fourth Re-Issue), as now established or as the same may be revised from time to time as approved by the Military Governor."

1.06. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 4 of said

General Orders No. 10 a new paragraph to be numbered and known as Paragraph 4.03, Title 4, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

“4.03. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction or other projects under the War Department or the Navy Department relative to wage shall not be abrogated without the written consent of the individual.”

1.07. Paragraph numbered 5.03, Title 5, General Orders No. 10, this office, 10 March 1943, as amended by Paragraph numbered 1.01, Title 1, General Order No. 20, this office, 26 April 1943, hereby is amended to read as follows:

“5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate, for overtime in excess of forty (40) hours per week, or in excess of eight (8) hours in any one day, except as noted in Paragraph 5.08 and 5.09. Where, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled workweek, premium wage of double time compensation shall be paid for work on the seventh day. One and one-half regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day.”

1.08. Paragraph numbered 5.06, Title 5, General Orders No. 10, this office, 10 March 1943, hereby is amended to read as follows:

“5.06. For employees engaged on construction and other projects under the War Department or the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of five (5) days.”

1.09. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding to Title 5 of said General Orders No. 10, two new paragraphs to be respectively numbered and known as Paragraphs 5.08 and 5.09, Title 5, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

“5.08. Persons employed on construction or other projects under the War Department or the Navy Department in connection with derricks, dredges, drill rigs and tugs shall be paid overtime on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight (8) hours in any one day or hours in excess of forty-eight (48) hours per week.

“5.09. The provisions of contracts, or extensions hereof, between individuals and employers engaged in construction or other projects under the War Department or the Navy Department relative to hours of work and overtime shall not be abrogated without the written consent of the individual.”

1.10. General Orders No. 10, this office, 10 March 1943, hereby is amended by adding thereto a new title and two new paragraphs to be respectively numbered and known as Title 9, General Orders No. 10, Office of the Military Governor, 10 March 1943, and Paragraphs 9.01 and 9.02, Title 9, General Orders No. 10, Office of the Military Governor, 10 March 1943, and to read as follows:

“9. SUBSISTENCE AND QUARTERS.

“9.01. The provisions of contracts, or extensions thereof, between individuals and employers engaged on construction and other projects under the War Department or the Navy Department relative to subsistence and quarters shall not be abrogated without the written consent of the individual.

“9.02. The practice of furnishing free board and lodging, or cash payment in lieu thereof, to persons employed locally or on new contracts shall be discontinued effective 1 November 1943.”

By order of the Military Governor of the Territory of Hawaii:

/s/ Wm. R. C. Morrison
WM. R. C. MORRISON
Colonel, J. A. G. D.
Executive

A TRUE COPY:

/s/ Robert B. Griffith
ROBERT B. GRIFFITH
Major, Infantry

Appendix D

The several proclamations of the Governor of Hawaii, the President of the United States and the military governor of Hawaii and the military orders issued during the existence of martial law are all notorious facts in Hawaii, of which the District Court took judicial notice. They appear in the records of the District Court in prior cases and also appear in the records of this Court. For the convenience of the Court and counsel they are collected below:

(1) Proclamation of Governor J. B. Poindexter, dated December 7, 1941, declaring martial law (see *Kahanamoku v. Duncan*, 146 F. 2d 576, No. 10763, R. 56).

(2) Proclamation of Walter C. Short, assuming office of military governor dated December 7, 1941 (*Kahanamoku v. Duncan*, No. 10763, R. 58).

(3) Approval of proclamation of martial law by President Franklin D. Roosevelt, December 9, 1941 (*Kahanamoku v. Duncan*, No. 10763, R. 61-62).

(4) Proclamation of Governor Ingram M. Stainback, dated February 8, 1943 (*Kahanamoku v. Duncan*, No. 10763, R. 70-74).

(5) Letter of President Franklin D. Roosevelt, dated February 1, 1943, approving the proclamation of the governor of Hawaii dated February 8, 1943, and of the commanding general of the same date (*Kahanamoku v. Duncan*, No. 10763, R. 74-76).

(6) Proclamation of military governor dated February 8, 1943 (Kahanamoku v. Duncan, No. 10763 R. 77-81). Under this proclamation certain jurisdiction was relinquished by the military governor to the Governor of the Territory of Hawaii. Item (r) of this proclamation provided for the relinquishment of:

Control of the supply, employment, hours, wages and working conditions of labor except as to (1) employees of the United States under the War Department or the Navy Department; (2) workers employed on construction and other projects under the War Department or the Navy Department; (3) stevedores and other workers employed on docks and dock facilities, and (4) employees of public utilities.

It is contemplated that the commanding general and the governor of Hawaii by mutual agreement will appoint a joint advisory committee which shall from time to time consult and advise with each of them with reference to labor matters in their respective fields.

(7) General Orders No. 10, relating to labor (Kahanamoku v. Duncan, No. 10763, R. 208-214).

(8) Amendment to General Orders No. 10, relating to labor (Kahanamoku v. Duncan, No. 10763 R. 311-317).

(9) Proclamation of President Franklin D. Roosevelt, terminating martial law, October 24, 1944 (Proclamation No. 2627, 9 Fed. Reg. 12,831).

No. 12229

**In the United States Court of Appeals
for the Ninth Circuit**

**KAM KOON WAN, ON HIS OWN BEHALF AND ON BEHALF OF ALL
OTHER PERSONS AND EMPLOYEES OF DEFENDANT WHO ARE
SIMILARLY SITUATED, APPELLANTS**

v.

E. E. BLACK, LTD., A HAWAIIAN CORPORATION, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE TERRITORY OF HAWAII**

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS
AMICUS CURIAE**

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

**WILLIAM A. LOWE,
HELEN GRUNDSTEIN,**
Attorneys,

United States Department of Labor.

KENNETH C. ROBERTSON,
Regional Attorney.

FILED

SEP 26 1949

PAUL P. O'BRIEN,
CLERK

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(I)

and for work performed on some projects prior to December 7, 1941 (R. 89). The district court awarded recovery for certain other work performed prior to December 7, 1941 (R. 90) but denied relief for claims during the period between December 7, 1941 and November 10, 1943, when martial law had been declared in the Territory of Hawaii (R. 35, 87, 89). Relief for this latter period was held barred under Section 9 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. Sec. 269) on the ground that appellee had "no freedom of choice" other than to comply with the general orders of the Military Governor establishing the labor policy in the Territory (R. 45). Compliance with these orders was held to make "impossible" compliance with the Fair Labor Standards Act (R. 48).

The denial of recovery for work performed on many of the construction projects prior to December 7, 1941 was based on a "Ruling upon Coverage Pursuant to Stipulation" without a full trial (R. 69, 76). The "Ruling upon Coverage Pursuant to Stipulation" held that the work performed under contract between appellee and the Federal Government (excepting the post office at Hilo, Hawaii) did not constitute engagement in commerce or the production of goods for commerce within the meaning of the Act because it was "work for the Government upon military reservations," and (with the exception of the addition to the Administration Building for the Fourteenth Naval District and the battery charging distribution system) was "new construction" (R. 79). Some of the other projects listed in the stipulation and not performed under contract with the Federal Government were held not to be within the coverage of the Act because they constituted "new" construction (R. 81, 85).

This appeal relates to the denial of recovery for work performed prior to December 7, 1941, which the Court held did not fall within the coverage provisions of the Act, as well as for work performed between December 7, 1941 and November 10, 1943 which the court held barred by the Portal Act (R. 132).

The pertinent statutory provisions, which are reprinted as Appendix A to this brief, are Sections 3 (b), 3 (c), 3 (d), 3 (j),

and 7 (a) (3) of the Fair Labor Standards Act and Section 9 of the Portal Act.

The district court had jurisdiction under Section 16 (b) of the Act and also under Title 28, United States Code, Section 1331. This Court has jurisdiction of this appeal under Title 28, United States Code, Sections 1291 and 1294 (1).

SUMMARY OF ARGUMENT

1. The court below erred in holding that the Fair Labor Standards Act is inapplicable to work performed on a "military reservation" (R. 79). That the Act attaches no significance to the fact that the site of the work may be a "military reservation" is evident from the statutory definition of "commerce" in Section 3 (b) of the Act, and from the decisions of the Supreme Court (*Vermilya-Brown Co. v. Connell*, 335 U. S. 377) and of this Court (*Ritch v. Puget Sound*, 154 F. (2d) 334; *Joshua Hendy Corporation v. Mills*, 169 F. (2d) 898), holding the Act applicable to work performed on Army or Navy sites. Moreover, nothing in military usage justifies the distinction between work performed on military reservations and other Government lands.

2. The court also erred in holding, on the basis of inadequate evidence, that many of the projects worked on by appellants for the Territorial Government and private industry constituted "new" construction and were, therefore, not within the scope of the Act (R. 80-86). There is no basis in the record for this ruling. The facts, if developed, might well show that some of appellants engaged on such projects have been engaged in interstate commerce or production of goods for commerce—such as the ordering, receipt and unloading of goods received from outside the State or handling of materials destined for interstate shipment (*Walling v. Jacksonville Paper Co.*, 128 F. (2d) 395 (C. A. 5), affirmed 317 U. S. 564) or work in connection with the improvement, maintenance and extension of existing instrumentalities of commerce or industrial facilities (*Pederson v. J. F. Fitzgerald Const. Co.*, 318 U. S. 740; 324 U. S. 720; *Ritch v. Puget Sound*, 156 F. (2d) 334 (C. A. 9); *Walling v. McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785). "The fact that all of * * *

[appellee's] business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work." *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571. In view of the "far flung import" of the issues and the limited record presented, the court should not have reached a decision "on an indefinite factual foundation". *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256, 257.

3. Finally, the district court erred in holding that Section 9 of the Portal Act barred appellants' wage claims for approximately two years—from December 7, 1941 to November 10, 1943. Contrary to the court's assumption, compliance during that period was not rendered impossible by the orders of the Military Governor in Hawaii, and any failure to pay statutory overtime was not "in good faith in conformity with and in reliance on" such orders. Since the orders were applicable only to defense work for the Army and Navy and not to other Federal, territorial or private construction projects, the wage provisions of the orders could have no effect whatsoever on approximately 20% of the projects involved. With respect to the other projects, the orders were either silent as to weekly overtime and therefore presented no conflict with the statutory overtime requirements (Cf. *Walling v. Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (C. A. 6)), or specifically retained the statutory requirements by providing that nothing in the orders conflicted with or superseded the Act.

ARGUMENT

I

Persons employed on a military reservation by a private company to perform the work required in its contract with the Government are not thereby excluded from the benefits of the Act

The district court held with respect to certain of the construction projects that appellants were not engaged in interstate commerce or in the production of goods for such commerce because they performed their "work for the Government upon military reservations" (R. 79). The court's reasons for this ruling are not stated. It is clear that the court considered

appellants to be employees of appellee (a private contractor) and did not regard them as employees of the Government under Section 3 (d). This is evident from the court's ruling that alteration work performed on the Federal Building Post Office at Hilo, Hawaii, under contract with the Treasury Department may be within the coverage of the Act (R. 78, 80). In this, the court was plainly correct since the only Government work excepted by Section 3 (d) is work by *Government employees*. The only question, therefore, presented by the court's ruling is whether work is necessarily withdrawn from the scope of the Act, as not constituting commerce or the production of goods for commerce, solely by reason of the fact that the work is performed on a "military reservation." The Administrator contends that the court's decision is contrary to the clear statutory language, the decisions of the United States Supreme Court and of this Court.

The district court's interpretation introduces an entirely irrelevant consideration into the determination of whether an employee is engaged in covered work. "Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3 (b). "State" is defined to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States." Section 3 (c). Whether appellants are engaged in "commerce" or in the production of goods for "commerce" would, therefore, depend on the relationship of their activities to the movement of goods to and from the Territory of Hawaii, and not on the nature of control over the precise place on the islands where the work is performed.¹

¹ If the court's citation of *Kennedy v. Silas Mason Co.*, 164 F. (2d) 1016 (Judgment vacated and remanded 334 U. S. 249) is construed as adopting the other grounds there relied upon by the Fifth Circuit in holding the Act inapplicable to defense projects constructed by private contractors, this Court's attention is directed to the Solicitor General's brief filed in the Supreme Court in the *Silas Mason* case. That brief was filed by the Administrator in this Court as part of his brief in *Joshua Hendy Corporation v. Mills*, No. 11794, June 1948 (169 F. (2d) 898). Questions similar to those discussed in the *Silas Mason* brief will be presented to the Supreme Court next Term in *Aaron v. Ford, Bacon & Davis*, 174 F. (2d) 730 (C. A. 8), certiorari granted June 27, 1949.

There is nothing in the statute to indicate that land reserved for military use is outside the purview of the statute. On the contrary, the Supreme Court recently held that the Act extends to employees at the military base in Bermuda, leased and occupied by the United States. *Vermilya-Brown Co. v. Connell*, 335 U. S. 377. Whether land is leased, owned or otherwise reserved for Government use is uniformly recognized by the Government defense establishments as not placing it in a special category. The term "military reservation" is merely "a phrase used by the War Department to describe real estate, devoted to War Department uses." *Ordnance Procurement Instructions* Jurisdiction and Military Reservations (57,200.1), Commerce Clearing House War Law Service (2d Ed.), Volume II (Government Contracts), par. 25,869. The War Department has stated that the phrase "has no particular legal significance," *ibid.* By giving the phrase special legal significance, the district court has drawn an artificial distinction based on the work site which finds no support either in Government usage or in law. Indeed, the usual cost-plus contract is ordinarily performed on territory controlled or owned by the Government. See, for example, Army-Navy statement that the Nation's armament program was carried out by commercial contractors or units "all" of which "are owned outright by the United States, and all but a very few * * * located upon military reservations."² Statement of Labor Policy Governing Government-Owned Privately Operated Plants, *War Department Labor Operations Manual* (of May 15, 1943).

²The district court apparently assumed that all of the work performed on Government contracts, with one exception, was on military "reservations." The record does not clearly indicate the locations where all the work was performed. It seems evident, however, that all of the Territory of Hawaii was not a military reservation. See, for example, Executive Order No. 8388, April 5, 1940, 5 F. R. 1361, providing for adjustment of the boundaries of the Puolo Point Military Reservation and Port Allen airport; Executive Order No. 8527 of August 27, 1940, 5 F. R. 3403, transferring a part of the Sand Island Military Reservation, Hawaii, to the Treasury Department; Act of October 16, 1941 (55 Stat. 741) authorizing the Secretary of War to convey the remaining portion of the Makalapa Military Reservation, Hawaii, to the Honolulu Plantation Company; Executive Order No. 8870 of August 25, 1941, 6 F. R. 4397, restoring to the Territory a part of the Waimanalo Military Reservation.

No reason appears for granting immunity from applicable Federal statutes to activities carried on on military reservations which is not granted to activities performed on non-military Government reservations. That work on a Government reservation is not ordinarily excepted from such laws was made clear by the Supreme Court in *Buckstaff Co. v. McKinley*, 308 U. S. 358. The Court in the *Buckstaff* case held the Social Security Act applicable to employees of an Arkansas Corporation which operated a bath house on the United States Government Reservation, Hot Springs National Park, and rejected the argument that the contractor was exempt as "an instrumentality of the United States" because of its location on the reservation. In holding a private business organized for profit was not converted into an instrumentality of the United States by the fortuity of its location, the Court stated (308 U. S. at 363):

* * * The control reserved by the Government for protection of a government program and the public interest is not incompatible with the retention of the status of a private enterprise. * * * That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality.

This Court in several decisions under the Fair Labor Standards Act has recognized that workers are not excluded from the scope of the Act because their work is performed on land reserved for the use of the defense establishment. Thus, in *Ritch v. Puget Sound*, 156 F. (2d) 334 (C. A. 9), construction employees dredging channels in the harbor of the Bremerton Navy Yard were held to be engaged in commerce within the coverage of the Act. Again in *Joshua Hendy Corporation v. Mills*, 169 F. (2d) 898 (C. A. 9), this Court held that construction work at the Wilmington, California, shipyard owned by the Maritime Commission constituted the production of goods for commerce. In the *Ritch* and *Hendy* cases Government ownership of the ships was not held to alter the coverage of the Act where the employees' activities met the statutory definition of commerce. Thus, it is clear that the performance of a contract with the

United States on a Government or military reservation provides no preferred status to an employer with respect to the coverage of the Fair Labor Standards Act, a statute of general application. The court below was clearly in error, therefore, in ruling otherwise.

II

There is insufficient basis in the record to decide the issue of coverage

On the basis of a stipulation merely enumerating, but not describing in detail, the projects on which the workers were engaged, the lower court held a large part of them to be "new" construction and not within the scope of the Act (R. 81, 85). But the characterization of a construction project as "new" does not withdraw such activity from the scope of commerce. *Pederson v. J. F. Fitzgerald*, 318 U. S. 740, 742; *Ritch v. Puget Sound*, 156 F. (2d) 334 (C. A. 9); *Walling v. McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785; *Bennett v. Loftis*, 167 F. (2d) 286 (C. A. 4). Rather the question to be resolved is not whether the work is "new" but whether it is related to existing commerce or production therefor. The court's holding with respect to coverage, however, was based entirely on a stipulation without development of any facts on the record which would enable it to determine the nature of the work performed or the relation of the employees' activities to commerce. It is submitted that the issues here involved should not have been determined by summary procedures. The coverage issues presented by this case are not "clear cut and simple," but are "issues of far flung import" which the Supreme Court has admonished should be decided only upon a full presentation of the relevant facts. *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 257.

The record in the instant case does not contain evidence on some of the most relevant matters. "The fact that all of * * * [appellee's] business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work." *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571. Thus, despite the fact that "the applicability of § 7 (a) of the Act

* * * is determined not by the nature of the employer's business, but by the character of the employee's activities" (*Tipton v. Bearl Sprott Co.*, 175 F. (2d) 432, 435 (C. A. 9)), there is nothing in the record showing the nature of any employee's activities. It is well established that activities relating to the procurement or ordering of goods from outside the State are in interstate commerce. *Walling v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. A. 5), affirmed 317 U. S. 564; *Walling v. Goldblatt Bros.*, 128 F. (2d) 778, 784 (C. A. 7), certiorari denied 318 U. S. 757; *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 339-341 (C. A. 8); *Walling v. West Kentucky Coal Co.*, 153 F. (2d) 582 (C. A. 6); *A. H. Phillips v. Walling*, 144 F. (2d) 102, 104 (C. A. 1); *Walling v. Herlihy*, 161 F. (2d) 568 (C. A. 4). Similarly, the unloading of interstate shipments has been held to constitute interstate commerce under the Fair Labor Standards Act. *Walling v. Jacksonville Paper Co.*, *supra*; *Walling v. Consumers Co.*, 149 F. (2d) 626, 629 (C. A. 7); *Walling v. A. H. Phillips*, *supra*; *West Kentucky Coal Co. v. Walling*, *supra*; *Walling v. Herlihy*, *supra*; *Walling v. Mutual Wholesale Food & Supply Co.*, *supra*. And employees who keep the books and records and write the correspondence relating to the buying, receiving and shipping of goods across State lines are engaged in commerce within the meaning of the Act. "Those who work either at selling or delivering across State lines, or at buying and receiving across state lines are employed in commerce, *whether they write the letters, keep the books or load and unload or drive the trucks*" (Italics supplied). *Walling v. Jacksonville Paper Co.*, *supra*; *Walling v. Mutual Wholesale Food & Supply Co.*, *supra*; *West Kentucky Coal Co. v. Walling*, *supra*. Although almost certainly a construction corporation, such as appellee, engaged in the general construction business under contracts with private individuals, the City and County of Honolulu, Territory of Hawaii and the United States (R. 19) would engage workers performing some of these activities relating to the procurement and receipt of extrastate goods, the court did not inquire into the duties of individual employees but denied recovery, in general sweeping terms, to workers on "new construction."

The variety of work performed by appellee's employees on contracts prior to December 7, 1941 is illustrated by the brief enumeration in the record of some 64 contracts (R. 69-76). Some of the projects for which recovery was denied include the construction of telephone, electric, radio and waterway facilities. Such projects performed under contract with the Federal Government were described as a battery charging distribution system at the submarine base at Pearl Harbor (R. 69, 77, 79), an airplane service landing mat at Ewa (*ibid.*), a mooring mast area (R. 69), and concrete bombproof shelters for Army radio facilities on Oahu (R. 70, 78). In addition, a wharf and concrete shed was built at Port Allen, Kauai for the Territorial Government (R. 73, 81), while a wharf and shed and wharf and pier were also constructed for a private industry (R. 73, 83, 84, 85). Construction of new substations at Hickam Field was undertaken for the Mutual Telephone Company (R. 83), the digging and back filling of trenches for underground conduits for the Hawaiian Electric Company, Limited (R. 74, 83), and the installation of a waterline for the Oahu Railway and Land Company (*ibid.*).

The decisions of the Supreme Court and of other courts have uniformly held that employees engaged in the improvement, maintenance and extension of such existing instrumentalities of commerce as are mentioned above are engaged in commerce within the meaning of the Act, even though the particular project, viewed in isolation, might be characterized as "new construction." *Pederson v. J. F. Fitzgerald Const. Co.*, 318 U. S. 740, 324 U. S. 726; *Overstreet v. North Shore Corp.*, 318 U. S. 125; *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C. A. 9); *Walling v. Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (C. A. 6); *Walling v. McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785; *Laudadio v. White Const. Co.*, 163 F. (2d) 383 (C. A. 2); *Bennett v. Loftis*, 167 F. (2d) 286 (C. A. 4).

Moreover, it appears that some employees may be engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act. To the extent that erection of such industrial facilities, as the ordnance machine shop at Fort Shafter, Honolulu (R. 70, 78), may have been a part of existing

facilities used to produce or repair parts of ships, planes, or submarines which were sent outside the Territory, such work would constitute the production of goods for commerce. *Walling v. Roland Electrical Co.*, 326 U. S. 657; *Joshua Hendy Corporation v. Mills*, 169 F. (2d) 898 (C. A. 9); *Griffin Cartage Co. v. Walling*, 153 F. (2d) 587 (C. A. 6); *Walling v. Morris*, 155 F. (2d) 832 (C. A. 6), reversed on other grounds 332 U. S. 422. But the court held this work not covered by the Act despite the fact that the nature of the individual employee's job classification, i. e., whether mechanics, laborers, etc., as well as the specific activity performed, is undeveloped in the record. In the ordinary case, however, these workers would be considered a part of "an integrated effort for the production of goods" and thus necessary to production within the statutory definition. *Armour & Co. v. Wantock*, 323 U. S. 126, 130. Nor is it shown by the record whether appellee's employees included a clerical and administrative staff to assist in the production activity. For "equally a part of the [productive] pattern are the administration, management, and control of the various physical processes together with the accompanying accounting and clerical activities." *Borden v. Borella*, 325 U. S. 679, 683.

Finally, a full presentation of the facts may show that the construction of a warehouse storage building and roads, an underground storage tank, container plant and warehouse all built for the Hawaiian Pineapple Company, Ltd. (R. 74, 83, 84) may be included within the statutory definition of production. The Act has been held to extend to the construction of a new structure and roadways used as an integral part of an existing plant producing goods for commerce. *Walling v. McCrady Const. Co.*, 156 F. (2d) 932 (C. A. 3), certiorari denied 329 U. S. 785. In the *McCrady* case, the repair of drainage ditches, plant roadways and walks were held integral parts of the existing plant. Moreover, the court in the *McCrady* case brushed aside artificial distinctions between "new" construction and reconstruction in holding subject to the Act work performed in building a new tinning mill and other new industrial facilities (see 60 F. Supp. 243, 251-252) as part of an existing establishment producing goods for commerce. The court quoted with approval the trial court's holding that "These new

units were all integral parts of existing plants and were constructed to enlarge or replace outmoded buildings and machinery and thus to continue the operation of the plant as a whole". (156 F. (2d) at 937.) If the structures in the instant case were in fact "integral parts" of processing plants, plants already in operation—as appears to be the case with the Hawaiian Pineapple Company—appellants' work would appear to be necessary to production "as part of an integrated effort" for the production of goods and therefore within the coverage of the Act. *Armour & Co. v. Wantock*, 323 U. S. 126, 130. If there is a complete trial in this case, "appellants will, of course, have the burden of proving that the process or occupation in which they were employed was, in fact, necessary to the production of goods for commerce. They may sustain this burden. They may fail to sustain it, but we cannot assume they will fail." *Tipton v. Bearl Sprott Co.*, 175 F. (2d) 432, 435 (C. A. 9).

In view of the inadequacy of the present record, it would seem impossible to determine whether appellants' work should be regarded as properly within the scope of the Act. When such a limited record was presented to the Supreme Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, involving questions of coverage with respect to employees of a cost-plus-fixed-fee contractor with the Government, the Court vacated a summary judgment and remanded the case to the district court. The Supreme Court there pointed out that "No conclusion in such a case should prudently be rested on an indefinite factual foundation." 334 U. S. at 256. Accordingly, we respectfully suggest that the case be remanded to the district court to determine all relevant facts regarding the construction work in which appellants were engaged.

III

The military orders governing labor conditions in the Territory of Hawaii provide no defense under section 9 of the Portal-to-Portal Act

The lower court's judgment barring, under Section 9 of the Portal Act (29 U. S. C. sec. 259), appellants' wage claims for the period from December 7, 1941 to November 10, 1943 was

based on its holding that appellee had "no freedom of choice" other than to comply with military orders fixing wages during that period (R. 45) and that, therefore, compliance with the Fair Labor Standards Act was "impossible" (R. 48). Despite the added finding that defendant "must have known it was not paying and working its employees as directed by the Fair Labor Standards Act" (R. 48), the court concluded that any noncompliance was "in good faith in conformity with and in reliance on" orders of an agency of the United States.

It is the Administrator's position that nothing in the military orders issued precluded compliance with the Fair Labor Standards Act, and that therefore, any failure to pay the statutory wages was not "in good faith in conformity with and in reliance on" such orders. The applicable orders, issued by the Office of the Military Governor, governing working conditions in Hawaii, were General Orders Nos. 38, 91, 10 and 40 (R. 37-40). Their general purpose was to fix uniform wage rates on all defense projects, establish a regular 48-hour week on these projects, "freeze" employees on war projects and on certain private jobs, impose penalties on employees for leaving their jobs without bona fide releases from employers, and establish an appeal agency to hear discharge cases. (Cf. R. 62-66.) There was no indication in any of these orders that they were intended to supersede Federal laws otherwise applicable. On the contrary, these orders are consistent with the whole purpose of martial law, which is not to suspend existing laws but to see that the laws are faithfully executed. The Federal statute authorizing the declaration of martial law in Hawaii provides that "The governor shall be responsible for the faithful execution of the laws of the United States * * *." 31 Stat 153, 48 U. S. C. sec. 532.

It is important to note at the outset that the provisions of the general orders dealing with the length of the workweek and wage rates were limited to defense work under the Army and Navy Departments and did not include work performed for the territorial government or for private industry. The court, however, erroneously treated all construction work as governed by the orders and did not distinguish between the

kinds of projects undertaken.³ It is therefore apparent that the court's denial of recovery under the Portal Act could not properly apply to commercial work, which amounted to approximately 20% of the work during the period (R. 25, 40).

The only order specifically mentioning the Fair Labor Standards Act was General Order No. 91 which provided that "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938, or the Walsh-Healey Public Contracts Act" (R. 62). Thus at least for the period when General Order 91 was in effect—from April 1, 1942, to March 10, 1943, the specific provisions of the military order directed that the applicable Federal laws governing wages were not superseded.

Not only did the specific proviso negate any intent to supersede the provisions of the Fair Labor Standards Act, the wage requirements of General Order No. 91 presented no conflict with the wage standards of the Act. The Order provided generally for a normal workweek of six days of eight hours each and required overtime to be paid at the rate of one and one-half times the regular rate of pay for hours worked in excess of 44 in a week or in excess of 8 in one day (R. 38, 63). The Order contained nothing prohibiting compliance with the statutory standard which requires payment for the work covered by it at one and one-half times the regular rate after 40 hours in a week. Moreover, as shown above, the Order expressly disclaimed such conflict.

General Order No. 91 not only did not conflict with the Federal Act or preclude in any way overtime payment in accordance with statutory standards, but set rates in contemplation that the federal Act was applicable. Wage Schedule No. 9, referred to in General Order No. 91 as setting the wage scales for Government contractors (R. 63), listed rates of pay for designated job classifications. This Schedule established

³ Although General Order No. 38 (R. 59) does not contain the explicit delimiting provisions contained in the other orders, there is no question that it did not apply to private firms not engaged in war work. See fn. 4, *infra*, p. 15. Moreover, under General Order No. 38, wage rates were frozen on the Island of Oahu only and not on work performed on other islands. It does not appear that all of the work in issue was performed within this geographical limitation.

standard hourly rates for job classifications on the basis of the length of workweek (Appendix B, p. 23). Different base rates were thus set for classifications performing work on a forty-hour week, forty-four hour week, and forty-eight hour week (*ibid.*) The regulations preceding the Schedule and made a part thereof clearly stated that the "classifications listed under 40-hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40-hour week basis instead of a 44-hour week basis" (*ibid.*, p. 22). Thus, despite the clear wording of the Order negating any conflict with the Act, if any doubt was suggested as to the Act's applicability, the wage schedule incorporated in Order No. 91 made reference to the Federal law and established base rates with a view to its applicability. Far from giving notice of a "variance" with the Federal Act (R. 48), the military orders gave notice of the Act's requirements.

Nor did the earlier General Order 38 issued December 20, 1941, affect the continued application of the Fair Labor Standards Act (R. 59). Although it made no reference to the Federal Act, its provisions for a normal working day of eight hours and requirement that overtime be paid at one and one-half times the regular rate thereafter in no way posed a conflict with the Act, requiring overtime payment after forty hours in a workweek.⁴ It can hardly be contended that the failure of this Order to mention weekly overtime presented any conflict with the Federal law. Certainly, as demonstrated (*supra*, 14), any possible question presented by General Order 38 as to the applicability of the Act was clarified by General Order 91 issued shortly thereafter and containing the explicit

⁴ Although General Order 38 contained only a provision for payment of overtime after 8 hours in a day and contained no reference to the Walsh-Healey Public Contracts Act, providing for overtime payment for a workweek longer than 40 hours as well as for hours worked in excess of 8 in a day, representatives of the Military Government were advising employers that the higher labor standards of the Walsh-Healey Act and the Fair Labor Standards Act were in "full effect" and had not been suspended (see Appendix C, pp. 24-25).

See also President Roosevelt's statement reported in *Honolulu Star-Bulletin*, January 1, 1942, stating the governmental policy of continued enforcement in Hawaii of the Wage-Hour Law requiring compensation at time and one-half for hours worked over 40 in a week (Appendix D, p. 26).

statement that the Order was not intended to supersede or conflict with the provisions of the Fair Labor Standards Act.

General Order No. 10, issued March 10, 1943, following General Order No. 91, likewise presented no difficulty in complying with the Federal statute (Appendix E, p. 27). Like General Order No. 91, it provided, inter alia, for an 8-hour day and 6-day week with overtime payable after 44 hours in a week or 8 hours in a day. Like the other orders mentioned, no restriction was placed upon complying with the Federal statute and Wage Schedule No. 9, incorporated in the Order, designated standard wage scales and made specific reference to base rates established for activities subject to the Fair Labor Standards Act (Appendix B, p. 23).⁵

Since the orders presented no conflict with the application of the Fair Labor Standards Act, the lower court's holding that appellee was required to continue its wage practices cannot stand. The military orders here, unlike the flat prohibition of overtime compensation for certain supervisory employees contained in the War Department instructions in *Lassiter v. Atkinson Co.* (C. A. 9, decided August 24, 1949), did not prohibit additional compensation for hours worked in excess of the statutory maximum. The lower court's ruling would in effect repeal the Act "at a time when all, or nearly all major industries are operating upon government contract." *Walling v. Patton-Tulley Transp. Co.*, 134 F. (2d) 945, 949 (C. A. 6). In a similar situation reconciling the application of the Eight Hour Law (40 U. S. C. Sec. 321) with the Fair Labor Standards Act, the Court of Appeals for the Sixth Circuit stated, "Repeals by implication are not favored and a later law will not be construed to repeal one enacted prior thereto unless the two acts are so clearly repugnant that they may not easily be reconciled." *Walling v. Patton-Tulley Transp. Co.*, *supra*

⁵ The final order involved here, General Order No. 40, issued November 1, 1943, contained the same clause as General Order No. 91 providing that "Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act of 1938" and requiring overtime payment after 40 hours worked in a week or 8 hours in a day (R. 37; see record No. 10763, *Kahanamoku v. Duncan*, (1944), p. 311, filed in this Court). Appellee makes no contention that this latter order precluded compliance with the Federal statute.

at 948. Like the Eight Hour Law in the *Patton-Tulley* case providing for payment of overtime after more than 8 hours had been worked in a day, which was held completely consistent with the Fair Labor Standards Act, the original General Order 38 (R. 59) with the same provision as the Eight Hour Law may easily be reconciled with the Act and can stand in no favored position. "No difficulty will be perceived," said the Court in the *Patton-Tulley* case "in complying with both statutes,—giving overtime pay for work in excess of the weekly maximum, in the one case, and overtime pay for work in excess of the daily maximum, in the other." 134 F. (2d) at 948. Its subsequent replacement by General Orders No. 91 and No. 40, containing a clear proviso preserving the employee's right to higher wage and hour standards to which the Act might entitle him, cannot serve to deprive the employee of the benefit of the Act's standards. "No reason appears why contractors for the government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from doing so." *Patton-Tulley* case, *supra*, 134 F. (2d) at 949.⁶

Appellee has failed to show that it acted "in good faith in conformity with and in reliance on" any agency ruling which would bar any wage claim under the Fair Labor Standards Act. As the court found, appellee "knew or should have known it was not complying with the Fair Labor Standards Act" (R. 47). The military orders on which appellee claims to rely did not make compliance with the Act impossible, but, rather, as

⁶ The Acting Administrator's views as expressed in a telegram of December 10, 1941, to the Labor Department's Territorial Representative (R. 41) was intended to apply only to the situation where the Government is in the position of an employer in supervising, controlling and paying workers and not where the direction, supervision, and control of the work is maintained by private firms. Cf. *Creekmore v. Public Belt Railroad Commission*, 134 F. (2d) 576 (C. A. 5), certiorari denied 320 U. S. 742. Similarly, the letter of February 18, 1941, from the Administrator to Secretary Knox (Def. ex. 2, R. 119), referring to certain construction work not covered by the Act, was not intended to give blanket exclusion to construction workers on Government projects and was subsequently modified to clarify any misunderstanding with respect to the Act's coverage (Appendix F, p. 29). Nor was there good faith reliance on such interpretations as required by Section 9 of the Portal Act (R. 41-42, 125). Cf. *Lassiter v. Atkinson Co.*, (C. A. 9, decided August 24, 1949).

we have shown, required such compliance. The court, therefore, erred in holding that there was a repugnance or inconsistency between the military orders and the operation of the Federal statute.

Respectfully submitted.

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SEPTEMBER 1949.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Questions raised on this appeal deal with the applicability of the following sections of the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947.

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201.

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked or in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is en-

gaged in commerce or in the production of goods for commerce—

*

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*

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. sec. 261 et seq.

SEC. 9. Reliance on past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceedings, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

APPENDIX B

WAGE SCHEDULE No. 9—(Revised—May 3, 1942)

LABORERS AND MECHANICS

Rules and Regulations

1. Effective date of this revised and amplified Wage Schedule No. 9 shall be the beginning of the first pay roll period after May 3, 1942. The wage rates shown on Schedule No. 9 are to apply to all persons employed on defense projects in the Territory of Hawaii, amenable to General Order #91, whether employed locally or on the mainland. In the case of those persons employed on the mainland for work in the Territory of Hawaii, they shall be furnished with free board and lodging or, in lieu thereof, a cash payment of \$45.00 per month, at the option of the employer.

2. The furnishing of free board and lodging or the cash payment to mainland workmen shall be a consideration for the necessity of maintaining a mainland home, other expenses resulting from their residence away-from home, and surrendering the privileges of life in their home community.

3. As provided for in General Order #91, no person shall be employed at a rate less than, or in excess of, the rates contained in this schedule, provided that employees presently receiving rates in excess of those shown on this schedule shall not be reduced.

4. Certain persons now employed on defense projects in the Territory of Hawaii under contract from the mainland have formerly received salary or wages for loss of time due to illness or compensable injury. Such time lost through illness or compensable injury will no longer be paid, effective the beginning of the first pay roll period after May 3, 1942. Henceforth, the only payments for loss of time shall be those to which the employee is entitled under the Defense Base extension of the Longshoremen's and Harbor Workers' Compensation Act.

5. Classifications listed under 40-hour week basis are those subject to Fair Labor Standards Act of 1938, which provides for payment on a 40-hour week basis instead of 44-hour week basis.

6. Classifications shown in second column provide for payment on a 44-hour week basis.

7. Classifications shown in third column are on a 48-hour week basis and are to be used only on those projects working on a stipulated 48-hour week, prior to April 1, 1942.

8. Payment for overtime work on all job classifications included in this schedule shall be on the basis of one and one-half times the regular rate of pay for hours worked in excess of eight hours in one day, and hours in excess of the stipulated workweek.

EXCERPTS FROM WAGE SCHEDULE NO. 9

Revised 3 May 1942

LABORERS—MECHANICS

<u>Classification</u>	<u>40 Hr. Wk. Base Rate</u>	<u>44 Hr. Wk. Base Rate</u>	<u>48 Hr. Wk. Base Rate</u>
Aggregate Plant Foreman		\$1.60	\$1.65
Aggregate Plant Screenman		1.10	1.15
Asphalt Plant Foreman		1.60	1.65
Asphalt Plant Fireman		1.25	1.30
Barge Maintenance Foreman	\$1.05		
Bargeman	0.75		
* * *			
Shifter			1.65
Ship Foreman	1.20		
Sprinkler Fitter Foreman		1.65	1.70
Sprinkler Fitter		1.45	1.50
Sprinkler Fitter Helper		0.80	0.85
Steam Fitter Foreman		1.65	1.70
Steam Fitter		1.45	1.50
Steam Fitter Helper		0.80	0.85
Stevedore	0.75		
Structural Steel Foreman		1.95	2.00

* * *

EQUIPMENT OPERATORS

* * *

Carrier—Lumber	0.85	0.90	0.95
Carryall		1.40	1.45
Cement Gun		1.50	1.55
Concrete Mixer—Paving		1.25	1.30
Crane—¾ yd and over	1.55	1.60	1.65
Crane—Under ¾ yd	1.40	1.45	1.50
Crane Apprentice	0.95	1.00	1.05
Crusher		1.10	1.15
Derrick—Land		1.50	1.55
Dragline—¾ yd and Over		1.60	1.65
Dragline—Under ¾ yd		1.45	1.50
Feeder (Crusher)		1.10	1.15
Finishing Machine (Concrete or Asphalt)		1.25	1.30
Grader (Motor)		1.30	1.35
Grout Gun		1.10	1.15
Grout Mixer		1.10	1.15
Group Pump		1.10	1.15
Guniting		1.50	1.55
High-lift	0.85	0.90	0.95
Hoist Steam (1 & 2 drums)		1.25	1.30

APPENDIX C

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
Honolulu, T. H.

January 10, 1942.

GRACE BROTHERS, LIMITED,
75 South Queen Street, Honolulu, T. H.

GENTLEMEN:

Mr. Howard Durham, Representative of the Labor Department of the United States in the Territory of Hawaii, has brought to my attention your request to him for information as to whether the Walsh-Healey Act applied on your contract to furnish supplies to this office.

You are advised that compliance with the Walsh-Healey Act, as required by the terms of your contract with the District Engineer, is in full effect and has not been suspended by any order issued by the Military Governor which has been brought to the attention of the District Engineer.

Very truly yours,

THEODORE WYMAN, Jr.,
Colonel, Corps of Engineers,
District Engineer.

cc—Mr. Durham, Labor Board.

347 FEDERAL BUILDING
Honolulu, T. H.

January 13, 1942.

Col. THEODORE WYMAN, Jr.,
District Engineer, U. S. Engineer Department,
P. O. Box 2240, Honolulu, T. H.

DEAR COLONEL WYMAN:

Enclosed herewith is a copy of a memorandum issued by the Hawaiian Electric Co., Ltd., to its employees on January 6, explaining the delay in the payment of overtime and instructing all employees to remain in their present jobs in accordance with Section 2 of General Order No. 38.

As you know, I attended the conference on December 12 in the Construction Quartermaster's Office at Pearl Harbor at which time the basic points subsequently covered in General Orders No. 38 were discussed, and hence feel cognizant of the purpose and intent of this Order. It is my opinion, based on that discussion, that Section 4 of the General Orders defining the workday was intended to apply only to direct defense industries and was not intended to apply to private industry. The Hawaiian Electric Company, however, which is subject to the Fair Labor Standards Act (requiring time and one-half for hours in excess of 40 per week), takes the position that this Section applies to its operations and hence has suspended overtime payments entirely until this question is clarified by the proper authorities.

This office would appreciate an opinion from your office as to whether Section 4 of the present Orders regulates the overtime policy of the subject company.

Very truly yours,

HOWARD E. DURHAM,
Special Representative.

Enclosure
HED: EB

APPENDIX D

U. S. WAGE-HOUR LAW IS OPERATIVE HERE

The Federal Wage-Hour act is still operative here, says Howard E. Durham, special representative of the United States Department of Labor.

Mr. Durham, referring to a recent proposal that wages and hours should be "frozen" on defense work, pointed to a recent announcement of President Roosevelt. This announcement, a copy of which, in the form of a news dispatch, has been sent to Mr. Durham from the regional office in San Francisco, is as follows:

"President Roosevelt said today he thought the 40 hour week provisions of the Wage-Hour act still stood, and any working time over 40 hours should be compensated for at time and a half.

"He replied in the negative to a press conference question whether any change in the 40 hour provision was contemplated in view of the war situation. However, there might be some lengthening of hours for Government workers, he agreed."

HONOLULU STAR-BULLETIN
JANUARY 1, 1942

APPENDIX E

GENERAL ORDERS No. 10¹

* * *

4. Wages.

4.01. Revised Wage Schedule No. 9, dated 3 May 1942 and effective at the beginning of the first pay-roll period after 3 May 1942, hereby is designated as the standard wage scale for workers engaged in work on construction and other projects under the War Department. No person seeking work or employed on construction or other projects under the War Department or the Navy Department, shall be employed at a rate less than, or in excess of the standard rate for the job as listed in Wage Schedule No. 9, and as same may be revised from time to time, as approved by the Military Governor.

4.02. Federal agencies under the War Department or the Navy Department, shall continue their regularly established wage schedules.

5. Hours of Work and Overtime.

5.01. Normal workweek for employees on construction and other projects under the War Department or the Navy Department shall be six (6) days of eight (8) hours each. The maximum number of hours worked in any seven (7) consecutive days shall not exceed fifty-six (56), except in cases of emergency and with the approval of the Chief of Military or Naval Service concerned.

5.02. Normal workweek for employees of the United States under the War Department or Navy Department shall conform to applicable Federal regulations.

5.03. Employees on construction and other projects under the War Department or the Navy Department shall be paid overtime at the rate of one and one-half the regular rate for overtime in excess of forty-four (44) hours per week, or in excess of eight (8) hours in any one day. Double the regular

¹ General Order No. 10 is reprinted in full in record filed in this Court in *Kahanamoku v. Duncan*, No. 10763 (1944), Vol. I, p. 208.

rate will be paid for work performed on the seventh consecutive work day. One and one-half the regular rate will be paid for work performed on any of the following days only: New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and Memorial Day.

5.04. Paragraph 5.03 above shall not apply to employees who are in a supervisory capacity on a monthly salary basis.

5.05. Employees of the United States under the War Department and the Navy Department shall be paid overtime in accordance with applicable Federal regulations.

5.06. For employees engaged on construction and other projects under the War Department and the Navy Department, work shall be so scheduled that all employees shall receive one (1) day off in seven (7). Sunday work per se shall not be considered overtime, and no overtime shall be paid for Sunday except when it is worked consecutively in excess of six (6) days.

5.07. The provisions of any contract between individual employees, labor unions, and employers engaged on construction and other projects under the War Department or the Navy Department, in conflict with the provisions of this General Orders hereby are suspended.

* * *

APPENDIX F

FEBRUARY 19, 1943.

Hon FRANK KNOX
Secretary of the Navy
Washington, D. C.

MY DEAR MR. SECRETARY:

Reference is made to my letter of November 13, 1942, regarding a conference with representatives of your Department, the War Department, the Defense Plant Corporation and myself to resolve any misunderstanding which might exist concerning the applicability of the Fair Labor Standards Act to employees of firms engaged in construction work for the Government.

Since the conference, and the earlier meeting at which representatives of several of the firms were present, I have made a complete canvass of the facts and have concluded that a contractor holding a cost-plus-a-fixed-fee contract from the Government is in a position no different from that of a contractor doing work for a private customer, so far as his liability under the Fair Labor Standards Act is concerned.

The position of this Division respecting applicability of the Act to employees of construction firms has been set forth in bulletins and interpretations with which the members of the industry generally are familiar. Briefly, employees engaged in the original construction of buildings are not generally within the scope of the Act even if the buildings when completed will be used to produce goods for commerce. There may be, and there usually are, some employees of such construction contractors, however, who engage in some form of interstate commerce and for that reason are subject to the Act. Hence, in the case of the new construction of buildings, the Act is applicable to employees engaged in receiving or unloading materials received from outside of the State, to watchmen who guard such materials, to office employees whose work is concerned with ordering, purchasing, or receiving such materials,

to draftsmen or office employees who prepare plans or drawings or records destined to leave the State in which they work, to timekeepers and payclerks who keep time records and make pay rolls for employees who work in connection with the shipment of materials or equipment away from the site to any point outside the State.

Where original construction is a part of the process necessary to the production of goods for commerce, for example the construction of an oil derrick preliminary to the production of oil, all employees are subject to the Act. All employees engaged in maintaining, repairing or reconstructing buildings used for the production of goods for interstate commerce or maintaining, repairing or reconstructing essential instrumentalities of commerce also are subject to the Act.

The enforcement policy of the Division with respect to such contractors will be to require compliance and payment of all wages due under the Act. The Division, however, will not seek restitution of wages due before March 1, 1943, but the employees, if they care to do so, have the right under Section 16 (b) of the Act to bring their own suits to recover double the amount of any additional wages due plus costs and reasonable attorney's fees.

Very truly yours,

L. METCALFE WALLING,
Administrator.

AD:FGG:VD

Copy/nr

MARCH 1, 1943.

The Honorable
THE SECRETARY OF THE NAVY

MY DEAR MR. SECRETARY:

Reference is made to my letter of February 19, 1943, concerning the applicability of the Fair Labor Standards Act to employees of contractors doing work for the Government on a cost-plus-a-fixed-fee basis.

I am advised that at a conference held in Washington on February 18, 1943, attended by Mr. William R. McComb, the Deputy Administrator of this Division, Mr. Irving J. Levy, the Solicitor of the Department of Labor, Lieut. Charles Pennebaker, of the Bureau of Yards and Docks of the Navy Department, and a number of representatives of the War Department, Lieut. Pennebaker called attention to a letter addressed to you on February 18, 1941, by James F. King, Acting for Philip B. Fleming, at that time Administrator of this Division.

Lieut. Pennebaker stated that the Navy Department had interpreted Mr. King's letter as a holding by this Division that no employee of a cost-plus-a-fixed-fee contractor is subject to the Fair Labor Standards Act if that contractor is engaged on construction work.

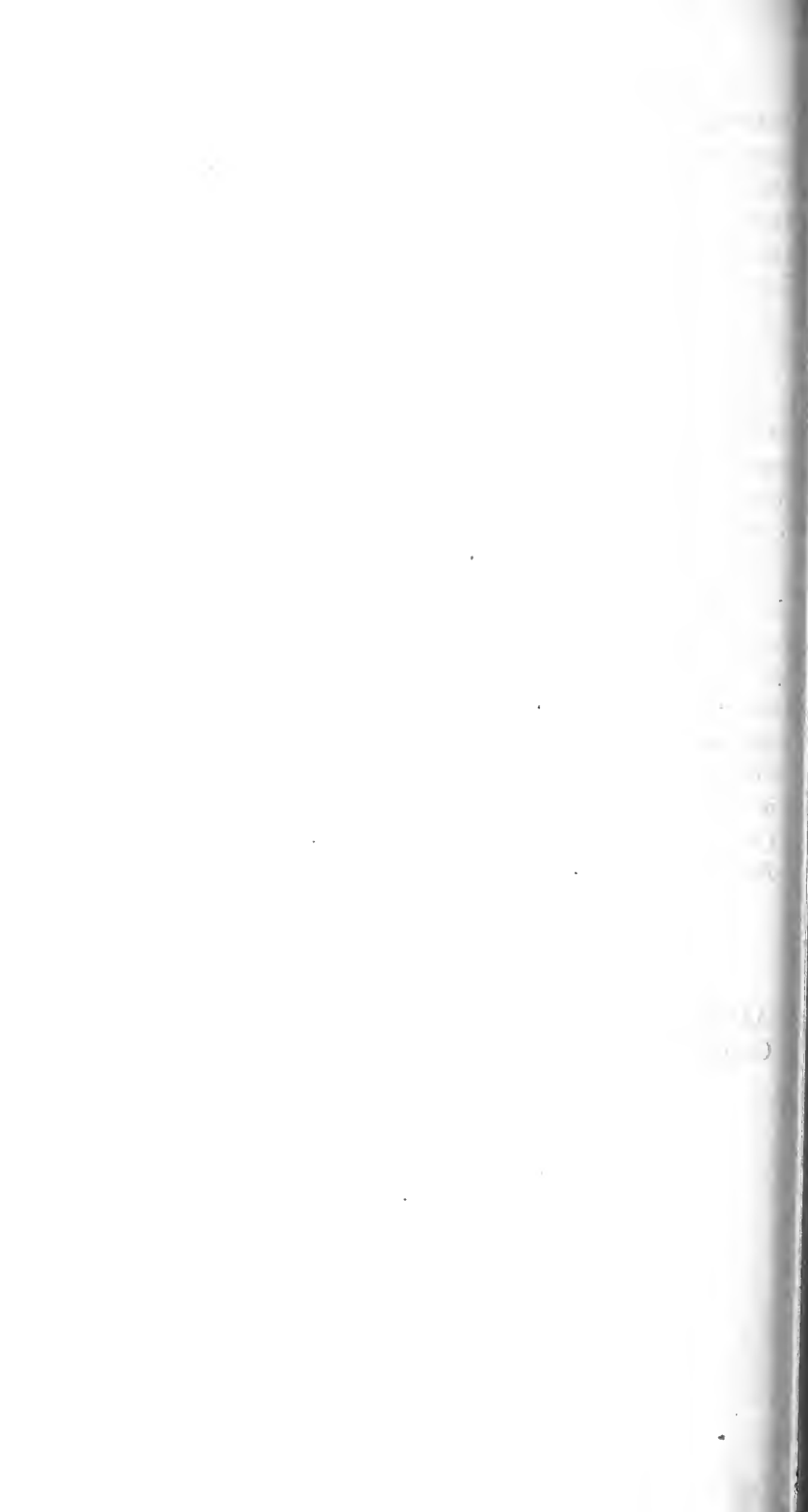
One of the purposes of my letter of February 19 was to overrule the letter from Mr. King which I consider to have been erroneous and to point out that in my opinion employees of such contractors doing work for the Government are in a position no different from that of the employees of contractors doing similar work for private customers. The position that a cost plus-a-fixed-fee contractor is not an agent of the United States is sustained by decisions of the courts, including the Supreme Court of the United States in the case of *Alabama v. King & Boozer*, 314 U. S. 1.

Sincerely yours,

L. METCALFE WALLING,
Administrator.

AD:FGG:VD

Copy/nr



United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12,229.

KAM KOON WAN, on His Own Behalf and on Behalf of All
Other Persons and Employees of Defendant, Who
Are Similarly Situated,
Appellants,

vs.

E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

REPLY BRIEF OF APPELLANTS.

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and

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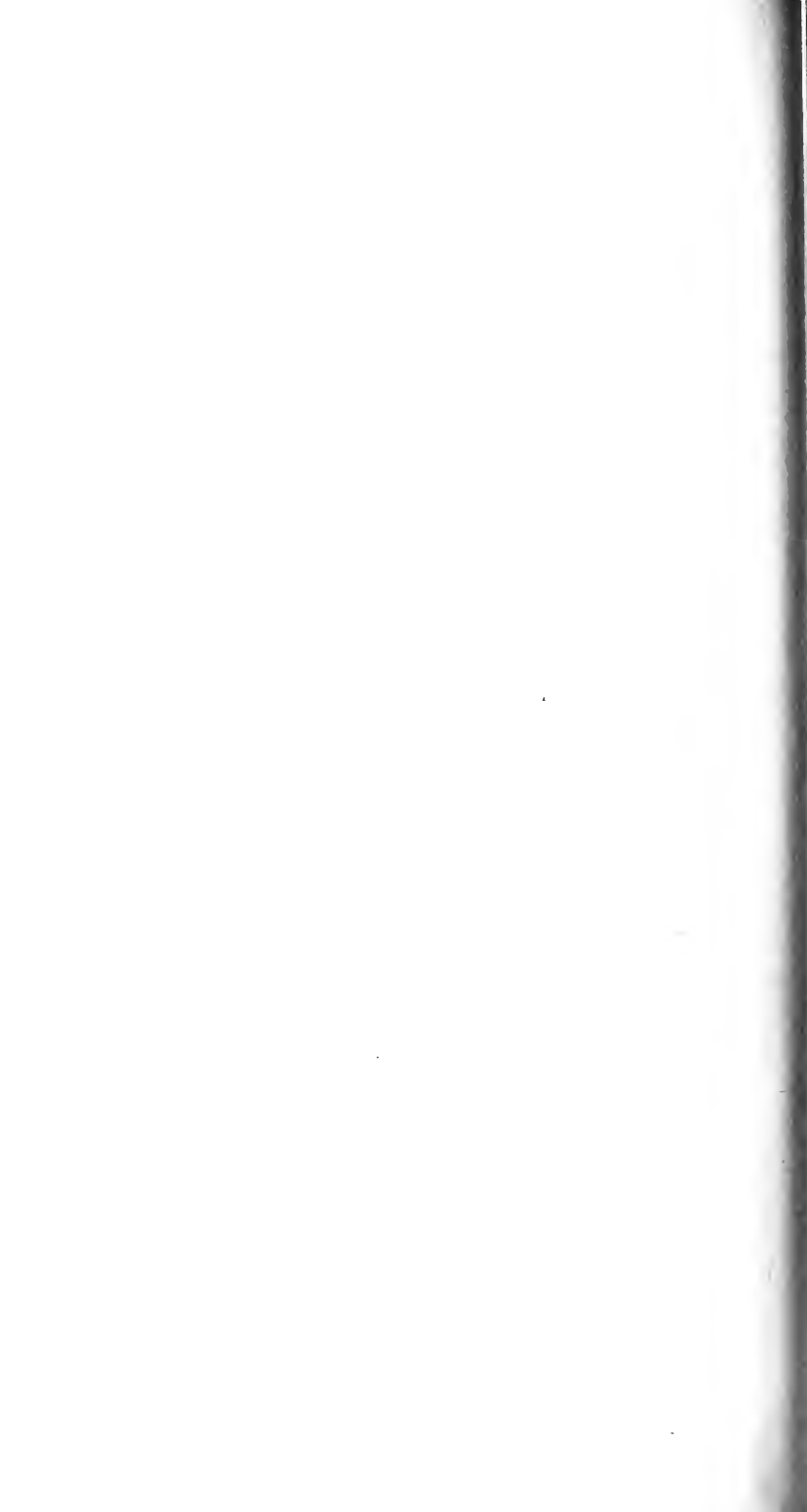
Of Counsel for Appellants.

FILED

SEP 27 1949

PAUL P. O'BRIEN, CLERK





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United States Court of Appeals

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E. E. BLACK, LTD., a Hawaiian Corporation,
Appellee.

REPLY BRIEF OF APPELLANTS.

ARGUMENT.

I.

**The Good-Faith Defense Was Improperly Determined
by a Motion for Summary Judgment.**

The rule of strict construction of the Portal-to-Portal-Pay Act of 1947 has been adopted by this court in its very recent case of **Lassiter v. Atkinson Co. et al.**, Nos. 12017-18, 11983-96, decided August 24, 1949, 9 W. H. Cases 126, where this court said:

“While the act should be strictly interpreted (because of the substantial rights which it impairs) still it is remedial legislation and it must be interpreted with this in mind, lest we do violence to the intent of Congress.”

Applying this rule of strict construction to the summary judgment granted by the trial court in the instant case, the affidavits in support of the motion for summary judgment would not constitute “pleading and proving”. While the federal rules may “govern all proceedings” and there may be no exceptions stated in Rule 56, F. R. C. P. (Appellee’s Brief, p. 14), the exception is construed from the language of Section 9, Portal-to-Portal Act, in the words, “if he pleads and proves.”

The proof of good faith is still to be accomplished, even though the affidavits may be uncontroverted. The affidavits must state sufficient facts to prove the good faith. **Facts** which would establish good faith, rather than the legal conclusion to that effect, were inadequate in the record submitted to the trial court. With such a limited record before it on the motion, the trial court should have submitted the issue to a full trial. **Kennedy v. Silas Mason Co.**, 334 U. S. 249.

Appellee argues (Brief, pp. 20, 21, 28) that appellants could have obtained additional facts on discovery if the affidavits were not detailed enough or that appellee could have provided supplemental affidavits. However, the burden of proving an affirmative defense is on the pleader thereof, and the appellants need not secure the defense for appellee by requesting more facts, nor does the presence or absence of a counter-affidavit determine whether that burden has been met. There is no burden on appellant to prove lack of good faith. It is up to the appellee to show its good faith to the court conclusively.

II.

There Was No Good Faith in Defendants’ Conformance With the Military Orders.

This court can set aside findings of the trial court where they are “clearly erroneous and due regard shall

be given to the opportunity of the trial court to judge of the credibility of the witnesses.” Rule 52 (a), F. R. C. P. There was no opportunity on the motion for summary judgment for the trial court to judge the credibility of witnesses. That the holding of the trial court is erroneous becomes apparent after a study of the analysis of the record.

The defendant-appellee contends that appellants are too late to argue that the overtime provisions of the military orders do not apply to the parties (Brief, p. 23); and say that the affidavits show that the orders applied to appellee.

There is nothing in the record to indicate that the military governor construed the order as being applicable to appellee’s employees. Had there been any inquiry or communication by appellee to the military governor or any governmental agency for a construction as to whether or not its employees were covered by the order, and then the defense asserted that the reply was relied upon, there would have been an objective basis for claiming good faith. But the affidavits contain no averment of fact that the military governor construed the orders to apply to appellee; they contain only legal conclusions by the affiants to that effect. Issue was taken with these conclusions before the trial court and this issue is not presented for the first time on appeal.

Appellee states that the military governor required the appellee to comply with body of order, regardless of the “Nothing herein * * *” clause (Appellee’s Brief, p. 24). One of the questions presented to this court is, what does the order actually mean? Did the order require appellee to pay overtime pursuant to Fair Labor Standards Act or pursuant to the military order? By obeying the Fair Labor Standards Act appellee would not be violating the order. But appellee would have us believe

that the military governor used the phrase, “Nothing herein * * *” without meaning and that the employers were to pay no attention to the clause (Appellee’s Brief, p. 24).

Appellee, with studied consistency, omits the word “superceding” from its discussion of the “Nothing herein * * *” clause throughout its brief. The word “superceding” in the phrase clearly means that the Fair Labor Standards Act should be superior to the order.

At page 28 of Appellee’s Brief there is a further attempt to throw the burden of proof on the appellants. No argument is made to overcome its failure to show a change in payment when the military orders took effect. But rather, appellants are again charged with failure to prove lack of good faith. Appellants merely argue that the good-faith defense has not been proved in light of existing facts, and that a finding to that effect with the present record, is “clearly erroneous”.

It is said (Appellee’s Brief, p. 28) that the lack of additional facts could have been stated by appellants even though they did not have facts at hand to controvert good faith. Such a verified statement was before the trial court as Paragraph VIII of the complaint (R. 5). Appellants did argue to the District Court that there was no good faith. They did not remain mute on this issue. While previous violations were not before the trial court at the time of summary judgment, they are in the record as the result of the trial, and this court may consider the previous violations in determining whether the trial court erred in finding good faith.

“If, on the entire evidence, we are ‘left with the definite and firm conviction that a mistake has been committed’ it is our duty to reverse the finding.”

Lassiter v. Atkinson Co., supra.

Great reliance has been placed by the appellee on the case of **Curtis v. McWilliams Dredging Co.**, 78 N. Y. S. 2d 317. At page 31 appellee states that the facts are much the same as the instant case, but there is substantial basis for distinction. The trial court there, in discussing the good faith of the defendants, detailed the entire series of correspondence between the employer and the War Department, and the circular letters issued by the War Department to the defendant-employer and others similarly situated, all of which is absent in the instant case. In the **Curtis** case there was objective action taken by the employer and there were directions given him. The court said,

“If we examine the relations of the defendants to the War Department, we find that although there were doubts in the minds of the defendants as to the applicability of the Statute, they were told that overtime would not be allowed under the Fair Labor Standards Act, and the very regulations and orders issued from time to time consistently bear out these instructions. * * * it is plain that there were orders and rulings relating to the payment of wages directed to the defendants and that the defendants complied with those rulings.”

Since this Court of Appeals decided **Lassiter v. Atkinson Co.**, supra, subsequent to the filing of appellants' original brief, and some of the principles announced in that case dealing with good faith are pertinent here, we take liberty to discuss the **Lassiter** opinion as it applies to the facts of this case.

Evidence upon which the trial court relied for its findings of good faith in the **Lassiter** case, is missing here. The Black Co. neither sought advice as to applicability of the Fair Labor Standards Act, nor did they receive any information from any authoritative source that they

were not covered. In the **Lassiter** case employers evidenced by their conduct that they were trying to devise plans to get their employees overtime in order to keep their employees content. “* * * had they supposed the Fair Labor Standards Act applicable, they would have made more specific reference to it,” instead of spending their efforts upon plans to get more overtime.

“Numerous directions of the War Department as to overtime payments at rates entirely inconsistent with those which the Fair Labor Standards Act would require” were assigned as another basis for finding good faith and that the employers were acting as reasonable men in complying with those numerous directions. No such “numerous directions by the War Department” to the Black Co. are found in the present case.

In the **Lassiter** case there was a War Department letter stating unequivocally that rulings from civilian agencies would be obtained by the War Department, thus prohibiting the employer from addressing questions to anyone other than the contracting officers. This is not in the instant record. Finally, there is not in this case, as there was in the **Lassiter** case, an “assurance that neither the War Department nor the employers considered that the Act was applicable to any of their employees, no matter what their duties.”

Absent all these evidences of good faith and present those factors previously called to the court's attention, which spell out bad faith, we submit that the trial court was “clearly erroneous” in holding that the employer failed to pay overtime in good faith in reliance on the military orders.

CONCLUSION.

It is respectfully submitted that the employer did not violate the Fair Labor Standards Act because it relied in good faith on an administrative order requiring it to do so, but merely because it sought to deprive appellants of their proper compensation under the law. For all the reasons stated in Appellants' Briefs, it is requested that this court reverse those parts of the judgment of the court below from which appeal is taken, with costs to the appellants.

Respectfully submitted,

SAMUEL LANDAU,

Attorney for Appellants.

ALFRED G. GOLDBERG

and

SAUL COOPER,

Of the Firm of

PADWAY, GOLDBERG & PREVIANT,

Of Counsel for Appellants.



